Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-381

PAUL J. WENGLER,
Appellant,

v.

DRUGGISTS MUTUAL INSURANCE COMPANY, AND
DISCUS PRESCRIPTION DRUGS, INC.,
Appellees.

On Appeal from the Supreme Court of Missouri

JURISDICTIONAL STATEMENT

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On Appeal from the Supreme Court of Missouri

JURISDICTIONAL STATEMENT

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Appellant, Paul J. Wengler, appeals from the final order of the Missouri Supreme Court entered July 17, 1979, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented. U.S. Supreme Court Rule 15, 28 U.S.C.A. §1257(2).

OPINIONS BELOW

The opinion of the Missouri Supreme Court entered June 27, 1979, motion for rehearing overruled July 17, 1979, and the opinion of the Circuit Court of Madison County, Missouri, are set out in the Appendix hereto. The decision of the Missouri Supreme Court is reported as *Wengler v. Druggists Mut. Ins. Co.*, 583 S.W. 2d 162 (Mo., 1979).

JURISDICTION

This action for workers' compensation death benefits draws in question the validity of 1976 Revised Statutes of Missouri Section 287.240 on the ground that the gender line the statute invokes is repugnant to the equal protection clause of the fourteenth amendment to the Constitution of the United States. The statute denies benefits to a widower absent mental or physical incapacity or proof of his actual dependency upon his wife's wages for his support; it accords full benefits to a widow by conclusively presuming her to be totally dependent upon her husband's wages for her support.

The federal constitutional question was timely raised by appellant before the case was submitted to the Administrative Law Judge and has continuously been raised on appeal. On October 13, 1977, the Circuit Court of Madison County, Missouri, held for appellant Wengler, ruling that the equal protection clauses of the Missouri and Federal Constitutions required death benefits for a man whose wife dies in a work-related accident on the same terms as Missouri provides for a woman whose husband dies in a work-related accident. On June 27, 1979, the Missouri Supreme Court reversed; the majority declared the gender classification valid and not repugnant to the Federal Constitution. The dissenting opinion of Justice Seiler

states the majority failed to follow the recent U.S. Supreme Court cases deciding gender-based discrimination.

A timely motion for rehearing, filed by appellant Wengler on July 6, 1979, was overruled by the Missouri Supreme Court on July 17, 1979. Notice of appeal to this Court was timely filed on July 19, 1979.

The jurisdiction of the U.S. Supreme Court to review this decision of the Supreme Court of Missouri on appeal is conferred by 28 U.S.C. Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Stanton v. Stanton*, 421 U.S. 7 (1975); *Duren v. Missouri*, 99 S.Ct. 664 (1979); *Orr v. Orr*, 99 S.Ct. 1102 (1979).

STATUTE INVOLVED

1976 Revised Statutes of Missouri Section 287.240 is set out in full in the Appendix hereto. In relevant part, the statute provides:

. . .

> (2) The employer shall . . . pay to the . . . dependents of the employee a death benefit . . .
>
> (4) The word *"dependent"* as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee and any death benefit shall be payable to them to the exclusion of other total dependents:
>
> (a) A wife upon a husband legally liable for her support, and a husband mentally or physically incapacitated from wage earning upon a wife; . . .

QUESTION PRESENTED

Whether 1976 Revised Statutes of Missouri Section 287.240, which authorizes workers' compensation death benefits for the spouse of a male worker without regard to dependency, but conditions benefits for the spouse of a female worker upon mental or physical incapacity or proof of dependency, discriminates impermissibly on the basis of gender in violation of the equal protection clause of the fourteenth amendment to the Constitution.

STATEMENT OF THE CASE

Ruth Wengler, wife of appellant Paul J. Wengler, was killed in an accident while working for Appellee, Discus Prescription Drugs, Inc. Appellant Paul J. Wengler made a claim for Workers' Compensation Death Benefits under 1976 Revised Statutes of Missouri Section 287.240. Prior to the July 21, 1977 hearing before the referee, widower Paul J. Wengler filed a memorandum of law setting forth that Section 287.240 violated the equal protection clause of the Federal Constitution; at the hearing, the referee noted that the constitutionality of Section 287.-240 was at issue.

Under the Missouri law in question, a widower may not obtain periodic workers' compensation death benefits unless he (1) is mentally or physically incapacitated from wage earning; or (2) proves actual dependency upon his wife's wages. By contrast, the Missouri law conclusively presumes a widow totally dependent upon her husband's wages; she qualifies for periodic workers' compensation death benefits without regard to actual dependency. It was stipulated that appellant Paul J. Wengler was not actually dependent for support in whole or in part upon the wages of his wife at the time of her death nor was he mentally or physically impaired from wage earning.

On August 4, 1977, the referee denied benefits to appellant Wengler on the sole ground that he did not meet the sex-specific statutory requirement of incapacity or dependency. On review, the Missouri Labor and Industrial Relations Commission, September 9, 1977, adopted the referee's award and denied compensation. On October 13, 1977, the Circuit Court of Madison County, Missouri, reversed. The Circuit Court of Madison County, Missouri, held Section 287.240 denied Paul J. Wengler the equal protection of the laws in violation of the Missouri and Federal Constitutions because the statute conclusively presumes the total dependency of a widow upon a husband who dies in a work-related accident, but denies that same presumption to a widower whose wife dies in a work-related accident.

On June 27, 1979, the Missouri Supreme Court reversed the judgment of the Circuit Court of Madison County, Missouri. In a 5-1 decision, the Missouri Supreme Court upheld the gender line drawn by Section 287.240, mandating dissimilar treatment of workers and their spouses, solely on the basis of sex.

The Missouri Supreme Court majority acknowledged this Court's condemnation in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), and *Califano v. Goldfarb*, 430 U.S. 199 (1977), of legislation based on "archaic and overbroad generalizations," statutes "casting female wage earners in a light which denigrates their economic contributions to their families' support." It also acknowledged the inconsistency of its decision with those of the three state courts that have recently applied *Wiesenfeld* and *Goldfarb* to invalidate proof-of-dependency requirements imposed on widowers, but not widows, under workers' compensation statutes. *Tomarchio v. Township of Greenwich*, 75 N.J. 62, 379 A.2d 848 (1977); *Arp v. Workers' Comp. Appeals Bd.*, 19 Cal.3d 395, 563 P.2d 849 (1977); *Passante v. Walden Printing Co.*, 53 App. Div.2d 8, 385 N.Y.S.2d 178 (1976). But it disposed of the judgments of this Court and others as "[i]n most instances" arriving at "self-serving conclusions."

THE FEDERAL QUESTION IS SUBSTANTIAL

Ruth Wengler was killed in a work-related accident. Because she was female, her surviving spouse, appellant Paul J. Wengler, does not qualify under Missouri law for workers' compensation death benefits. Were the sex of the spouses in this case reversed, it is undisputed that death benefits would be due.

The Missouri law in question conclusively presumes every female spouse "dependent." Every male spouse, the Missouri law labels nondependent absent proof of his incapacity to work, or his actual economic dependence on his wife's earnings. This gender classification is familiar. It is indistinguishable on any principled ground from the ones this Court has invalidated in a solid line of decision from *Frontiero v. Richardson*, 411 U.S. 677 (1973), to *Califano v. Westcott*, 99 S.Ct. 2655 (1979). As dissenting Judge Seiler in the Missouri Supreme Court succinctly stated, this Court's precedent instructs unambiguously that neither "administrative convenience" nor "overbroad characterization of the male as the primary breadwinner" can "serve to counterbalance or justify 'a gender-based distinction which diminishes the protection afforded to women who do work.'" (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975))

Applying the equal protection principle as elaborated in this Court's 1970s gender classification precedent, three state courts have recently invalidated proof-of-dependency requirements state workers' compensation laws imposed on widowers but not widows. *Tomarchio v. Township of Greenwich*, 75 N.J. 62, 379 A.2d 843 (1977); *Arp v. Workers' Comp. Appeals Bd.*, 19 Cal.3d 395, 563 P.2d 849 (1977); *Passante v. Walden Printing Co.*, 53 App. Div.2d 8, 385 N.Y.S.2d 178 (1976). Only Missouri continues to march to a different tune. Cf. *Duren v. Missouri*, 99 S.Ct. 664 (1979). No other jurisdiction, in the wake of *Frontiero* and *Wiesenfeld, supra*, and *Califano v. Goldfarb*, 430 U.S. 199 (1977), has aligned itself with the majority

below. See Note, 9 U. Mich, J. L. Ref. 138 (1975) (workers' compensation laws in most states extend conclusive presumption of dependency to widower and widow alike).

The Missouri Supreme Court purported to distinguish "the social security cases" (*Wiesenfeld* and *Goldfarb*) on the ground that the benefits to surviving spouses there at issue were "social insurance," "based upon mandatory contributions from past wage earnings of the employee." That distinction, wispy in any event, could hardly be approved on the date of the decision below, June 27, 1979, and surely not on July 17, 1979, when rehearing was denied. Because on June 25, 1979, this Court, in *Califano v. Wescott, supra,* unanimously declared unconstitutional a gender line drawn in the context of public assistance unemployed parent benefits. Those benefits were not tied to any "contributions from past wage earnings of the employee."

Westcott reiterated a point made consistently in *Frontiero, Wiesenfeld* and *Goldfarb*, and earlier last Term in *Orr v. Orr*, 99 S.Ct. 1102 (1979): Explicit sex classification statutes must fall which reflect the "baggage of sexual stereotypes," which presume that men have "primary responsibility to provide a home and its essentials," and women are the "center of the home and family life." *Califano v. Westcott*, 99 S.Ct. 2655 at 2663.

In summary, the majority of the Missouri Supreme Court is impossible to justify on any reasoned basis, and merits swift, summary reversal by this Court. Cf. *Turner v. Department of Employment Security*, 423 U.S. 44 (1975) (summarily reversing Utah Supreme Court decision for inconsistency with this Court's clear fourteenth amendment ruling).

CONCLUSION

The decision below upholding the statutory gender-based classification should be summarily reversed and sent back to the Missouri Supreme Court for a decision on whether the remedy should be to invalidate the entire provision of the Missouri Statute on workmen's compensation death benefits to surviving spouses or to extend the coverage to include both the widowers and widows under the Missouri statute on workmen's compensation death benefits. *Stanton v. Stanton*, 421 U.S. 7 (1975); *Turner v. Department of Employment Security*, 423 U.S. 44 (1975). Alternately, this appeal should be accorded plenary review.

Respectfully submitted,

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APPENDIX

APPENDIX A

Supreme Court of Missouri
en banc

Paul J. Wengler,
Respondent,
vs.
Druggists Mutual Insurance Company, and Dicus Prescription Drugs, Inc.,
Appellants.
No. 60,442.

Appeal from the Circuit Court of Madison County
Honorable Stanley J. Murphy, Judge

(Filed June 27, 1979)

The issue on this appeal is whether the provision contained in section 287.240, RSMo Supp. 1976, which affords a conclusive presumption of dependency to a widow for obtaining workmen's compensation benefits for the death of her spouse but requires a widower to prove actual dependency to receive reciprocal benefits, offends the equal protection clause of art. 1, sec. 2, Mo. Const., and amendment 14, U.S.Const.

Plaintiff-respondent Paul J. Wengler's wife Ruth was killed in an accident while working for defendant-appellant Dicus Prescription Drugs, Inc., and plaintiff made a claim for workmen's compensation death benefits under sec. 287.240(2). It is stipulated that plaintiff was not actually dependent for support, in whole or in part, upon the wages of his wife at the time of the injury, nor was he mentally or physically impaired from wage earning. In order for a widower to obtain periodic death benefits under 287.240(4) and (4)(a) upon the work-related

death of his wife, the widower must either be (1) mentally or physically incapacitated from wage earning, or (2) must prove actual dependency for support, in whole or in part, upon his wife's wages. However, if the husband dies in a work-related accident, the surviving widow is conclusively presumed to be totally dependent upon her husband's wages for support. She does not need to prove actual dependency. Sec. 287.240(4) and (4)(a).[1] A child under age 18 is also conclusively presumed to be totally dependent upon his parent under 287.240(4)(b).

The workmen's compensation referee denied plaintiff benefits because no dependency on his wife's wages was shown. On review, the Labor and Industrial Relations Commission adopted the referee's award and denied compensation. The circuit court reversed and held that because sec. 287.240 affords a conclusive presumption of total dependency to a widow upon her husband's work-related death, it constitutes a denial of equal protection under art. 1, sec. 2, Mo.Const., and the fourteenth amendment, U.S.Const., to require a widower to prove dependency and to deny that same presumption to a husband whose wife dies in a work-related accident.

---

[1] "(4) The word 'dependent' as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee and any death benefit shall be payable to them to the exclusion of other total dependents:

(a) A wife upon a husband legally liable for her support, and a husband mentally or physically incapacitated from wage earning upon a wife; provided, that on the death or remarriage of a widow or widower, the death benefit shall cease unless there be other total dependents entitled to any death benefit under this chapter. In the event of remarriage, a lump sum payment equal in amount to the benefits due for a period of two years shall be paid to the widow or widower. Thereupon the periodic death benefits shall cease unless there are other total dependents entitled to any death benefit under this chapter in which event the periodic benefits to which said widow or widower would have been entitled had he or she not died or remarried, shall be divided among such other total dependents and paid to them during their period of entitlement under this chapter;".

The employer and insurer appealed. This court has jurisdiction. Art. 5, sec. 3, Mo.Const. Our decision upholding the constitutionality of sec. 287.240(4) and (4)(a) renders other issues on the cross-appeal moot.

The workmen's compensation act is considered substitutional for common-law tort remedies. Sheet v. Hill Bros. Distributors, Inc., 379 S.W.2d 514 (Mo. 1964). Its primary purpose is to ameliorate, in the interest of working people and the public welfare, losses sustained from accidental injuries received by the working person in the course of employment, Reed v. Kansas City Wholesale Grocery Co., 156 S.W.2d 747 (Mo.App. 1941), and is to be liberally construed with a view to the public welfare. Sec. 287.800, RSMo 1969.

The act was first adopted by the legislature in 1925 (Laws of Mo. 1925, p. 375), and upon being referred to a vote of the people it was approved at the November 1926 election (Laws of Mo. 1927, p. 490).

Section 21 of the original act provided for compensation upon the death of an employee. The definition of "dependent" in sec. 21(d) has continued to the present unchanged and is now sec. 287.240. The conclusive presumption of dependency of "a wife upon a husband legally liable for her support" was part of the original act, as was the provision which results in a nondisabled husband being required to show actual dependency, in whole or in part, to receive compensation upon the work-related death of his wife.

Workmen's compensation is not, in the main, financed by taxes and the payment of compensation is not a governmental obligation but rather the obligation of the employer.

The plaintiff contends that because of the differential in treatment of husbands and wives in claims under sec 287.240 is

gender based, it violates the equal protection clause of art. 1, sec. 2, Mo.Const., and the fourteenth amendment, U.S.Const.

To withstand scrutiny under the equal protection clause, classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. Califano v. Webster, 430 U.S. 313, 316-317 (1977).

In Kahn v. Shevin, 416 U.S. 351 (1974), the court upheld the constitutionality of a Florida statute which, since 1885, granted all widows an annual $500 tax exemption as against an equal protection attack brought by a widower. The court said there could "be no dispute that the financial difficulties confronting the lone woman in Florida or in any other state exceed those facing the man. Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs." Earning statistics, cited in *Kahn*, of men as compared with women from 1955 to 1972 showed in 1972 that a woman working full time had a median income which was only 57.9% of the median for men—six points lower than in 1955. The court observed at 354, "While a widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer." It was also noted at 355, footnote 7: "It is still the case that in the majority of families where both spouses are present, the woman is not employed. A. Ferriss, Indicators of Trends in the Status of American Women 95 (1971)."

Kahn v. Shevin, *supra*, distinguished Frontiero v. Richardson, 411 U.S. 677 (1973), on the basis that the denial to service women of procedural and substantive benefits granted service men was **"solely"** for administrative convenience and served no important governmental objective; whereas, in Kahn, widows

were found to be at an economic disadvantage to widowers. The court thereupon held that the Florida statute rested upon a ground of difference that had a fair and substantial relation to be the object of the legislation.

Likewise, in Califano v. Webster, 430 U.S. 313 (1977), the court upheld a gender-based difference which benefited women by requiring fewer number of elapsed years to qualify for certain old-age insurance benefits for women than for men. This, the court held, was a justifiable difference to correct a long history of discrimination against women by a male-dominated culture and an inhospitable job market.

However, in Califano v. Goldfarb, 430 U.S. 199 (1977), the court held a gender-based distinction created by a provision of the social security act violated the due process clause of the Fifth Amendment. The provision in question allowed a widow to receive benefits based upon the earnings of her deceased husband without showing actual dependency but required a widower to prove he was receiving at least one-half of his support from his deceased wife to qualify for benefits upon his working wife's death. The court, following Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), said at 206-207:

> ". . . *Wiesenfeld* thus inescapably compels the conclusion reached by the District Court that the gender-based differentiation created by sec. 402(f)(1)(D)—that results in the efforts of female workers required to pay social security taxes producing less protection for their spouses than is produced by the efforts of men—is forbidden by the Constitution, at least when supported by no more substantial justification than 'archaic and overbroad' generalizations, *Schlesinger v. Ballard, supra,* 419 U.S., at 508, 95 S.Ct., at 577, or 'old notions,' *Stanton v. Stanton,* 421 U.S. 7, 14, 95 S.Ct. 1373, 1377, 43 L.Ed.2d 688 (1975), such as 'assumptions as to dependency,' *Weinberger v. Wiesenfeld, supra,* 420 U.S. at 645, 95 S.Ct. at 1231, that

are more consistent with 'the role-typing society has long imposed,' *Stanton v. Stanton, supra,* 421 U.S. at 15, 95 S.Ct. at 1378, than with contemporary reality."

The court also found the provision in violation of equal protection for essentially the same reason, saying at 208:

> "From its inception, the social security system has been a program of social insurance. Covered employees and their employers pay taxes into a fund administered distinct from the general federal revenues to purchase protection against the economic consequences of old age, disability and death. But under sec. 402(f)(1)(D) female insureds received less protection for their spouses solely because of their sex. Mrs. Goldfarb worked and paid social security taxes for 25 years at the same rate as her male colleagues, but because of sec. 402(f)(1)(D) the insurance protection received by the males was broader than hers."

But in Weinberger v. Salfi, 422 U.S. 749 (1975), the court upheld the denial of social security benefits to a woman applying for mother and daughter benefits on the basis of a provision in the act defining "widow" and "child" excluded surviving wives and stepchildren who had their respective relationship with the deceased wage earner for less than nine months prior to his death. Quoting from the earlier case of Dandridge v. Williams, 397 U.S. 471 (1970), the court said at 769:

> " 'In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Lindsley v. Natural

> Carbonic Gas Co., 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443, 57 L.Ed. 730. . . .' "

Other cases where the United States Supreme Court has invalidated statutes of various states on "invidious discrimination" grounds are: Craig v. Boren, 429 U.S. 190 (1976), the Oklahoma law allowed females to buy beer at age 18 but denied males age 18-20 the same right; Reed v. Reed, 404 U.S. 71 (1971); Idaho statute which gave preference to males as administrators of decedents' estates; Stanton v. Stanton, 421 U.S. 7 (1975), Utah law that made age of majority for females 18 but 21 for males.

In Frontiero v. Richardson, *supra,* a federal statute which allowed a serviceman to obtain an allowance for dependent housing if married, but did not allow a servicewoman to obtain dependency allowance for housing unless her husband was dependent upon her for more than one-half of his support, was held unconstitutional. It is noted that under the statute struck down in *Frontiero* the servicewoman was foreclosed from obtaining any benefits even though she may have supported the husband 49%; whereas, under the workmen's compensation provision in the instant case, a husband will receive benefits in accordance with the actual degree of support afforded him by his working spouse.

Three state courts have recently applied these principles to invalidate proof-of-dependency requirements imposed on widowers under their workmen's compensation statutes. Arp v. Workers' Comp. Appeals Bd., 19 Cal. 3d 395, 563 P.2d 849 (Bank 1977); Passante v. Walden Printing Co., 53 App. Div.2d 8, 385 N.Y.S.2d 178 (1976); Tomarchio v. Township of Green-

wich, 75 N.J. 62, 379 A.2d 848 (1977). In Arp, *supra,* the California Supreme Court found the conclusive presumption of dependency of widows to be violative of equal protection. The court held that the statute favors the male wage earner over the female wage-earner because of the disparity of protection accorded to their respective spouses. In *Passante* the court noted that death benefits are derived from the employment relationship itself, but a married woman has less security than a married man because of the conclusive presumption of dependency accorded to the widow but not the widower. Similarly, in *Tomarchio,* the New Jersey Supreme Court invalidated the dependency requirement of widowers as the court held the conclusive presumption accorded to widows denied women equal protection.

In summary, several jurisdictions have found statutory schemes similar to ours unconstitutional as perpetuating an outmoded standard which by its nature discriminates against those (women) whom it purports to protect.

The New York Supreme Court, Appellate Division, in *Passante* and the Supreme Court of California in *Arp* adopted a "strict scrutiny" standard of review for gender-based statutory schemes. As noted supra, in *Frontiero* the United States Supreme Court held a "dependency" provision invalid; however, only four justices adopted the "strict scrutiny" standard. Subsequent cases of the United States Supreme Court reinforces the concept that the "strict scrutiny" standard is inappropriate in these cases. See Craig v. Boren, *supra.* We decline to follow the approach utilized by New York and California, believing the "substantial relationship" test is more appropriate.

The social security cases of Califano v. Goldfarb, *supra,* and Weinberger v. Wisenfeld, *supra,* are also distinguishable. Although the issues dealt with dependency benefits, the social security scheme is generally based upon mandatory contributions from past wage earnings of the employee. The legislative history of the social security act makes it clear that survivorship benefits are in the form of "social insurance". Weinberger v. Wisenfeld, 420 U.S. at 644.

The purpose of the workmen's compensation act was not to provide for blanket "social insurance". It is substitutional to the common law creating rights and remedies in favor of the injured employee or dependents for accidents in the course of employment. See Todd v. Goosetree, 493 S.W. 2d 44 (Mo. App. 1973). The employer is the sole contributor to the fund, as opposed to the social security scheme of madnatory employee contributions (taxes) based on an income scale. See sec. 287.-290, RSMo 1969. Therefore, the United States Supreme Court cases of Weinberger v. Wisenfeld, *supra,* and Califano v. Goldfarb, *supra,* are not controlling in the case at bar.

Of some interest is the differing results reached in New York and New Jersey vis-a-vis California. In New York and New Jersey the court applied the "conclusive presumption" to widowers and thus *extended* benefits not provided for in the legislation. In California the court refused to extend benefits to widowers by using the "conclusive presumption" but rather denied that presumption to widows, thus withholding from widows the benefits of the legislation by requiring both widows and widowers to recover benefits only in proportion to proven dependency.

It appears from the opinions of the United States Supreme Court and the state courts in cases dealing with the same or similar matters, the courts have invalidated statutes by accusing Congress or state legislatures of "invidious discrimination" or of enacting statutes based upon "archaic and overbroad generalizations" which have "little relationship to present reality" or of casting female wage earners in a light which denigrates their economic contributions to their families' support. In

most instances the opinions do not rely upon evidence or empirical data to arrive at these self-serving conclusions.

On the other hand, the opinions which uphold statutes which, on their face, evidence different treatment and "discrimination" in favor of women utilize statistical data and speak of the legislation as serving the purpose of correcting past abusive discriminatory attitudes toward women.

On its face, sec. 287.240(4)(a) appears to *favor* a woman (widow) rather than discriminate against her, in that it affords the widow death benefits on her husband's compensable death without further proof of dependency. At the time the law was first adopted we can be reasonably certain equal protection contentions were not as prevalent as today, yet it seems apparent that the purpose of the presumption was to favor widows, not to disfavor them. The data available to the general assembly at that time no doubt supported the concept that a widow was more in need of prompt payment of death benefits upon her husband's death without drawn-out proceedings to determine the amount of dependency than was a widower. It seems reasonably certain that during the 1920's and 1930's it was more difficult than now for a woman to obtain employment with substantial pay and very difficult for her when, upon her husband's death, she was suddenly thrust into the job market. It seems rather obvious therefore that the purpose of the conclusive presumption of dependency was to satisfy a perceived need widows generally had, which need was not common to men whose wives might be killed while working.

None of the cases cited by the parties in briefs, or by the court in this opinion, holds that there was no important governmental objective to be served by the conclusive presumption provisions when they were enacted. The governmental objective was to require employers to alleviate the economic hardship resulting from a working spouse's death. This hardship was seen

by the legislatures as more immediate and pronounced on women than on men. The statistics cited by the United States Supreme Court in Kahn v. Shevin, *supra*, appear to bear this out even today, and the claimant here has not shown any evidence or presented any empirical data to the contrary.

We do not believe the cases of *Arp*, *Passante*, and *Tomarchio*, *supra*, articulate a sound basis for declaring the statute in this case violates the equal protection clause of etiher the Missouri or United States constitutions and therefore we decline to follow them. In so doing, we recognize the legislature must strike a delicate economic balance in deciding the amounts of compensation it will require employers to pay upon injury to or death of employees.

The widower is not deprived of death benefits upon the compensable death of his wife but is entitled to the same upon proof of dependency. In our opinion, the substantive difference in the economic standing of working men and women justifies the advantage that sec. 287.240(4)(a) administratively gives to a widow.

The judgment of the circuit court is reversed and the cause is remanded to the circuit court with directions to enter judgment affirming the decision of the Industrial Commission.

JOHN E. BARDGETT
Judge

Morgan, C.J., Rendlen, J., Finch, Sr.J., and Houser, Sr.J., concur; Donnelly, J., concurs in result in separate opinion filed; Seiler, J., dissents in separate dissenting opinion filed; Simeone and Welliver, JJ., not participating because not members of the court when cause was submitted.

Supreme Court of Missouri en banc

Paul J. Wengler,
Respondent,
vs.
Druggists Mutual Insurance Company,
and
Dicus Prescription Drug, Inc.,
Appellants.
No. 60442

OPINION CONCURRING IN RESULT

(Filed June 27, 1979)

Judges of state courts are bound to follow the "supreme Law of the Land" (Art. VI, Constitution of the United States). The "supreme Law of the Land" is *only* what the Supreme Court of the United States says it is. *Cooper v. Aaron*, 358 U.S. 1 (1958); *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *North Carolina v. Butler*, — U.S. — (No. 78-354, April 24, 1979).

The issue on this appeal is, in part, whether § 287.240, RSMo Supp. 1976, offends the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The essential problem, as I see it, is that no identifiable "supreme Law of the Land" exists by which we may adjudicate a claim of alleged gender-based discrimination. Cf. *Muller v. Oregon*, 208 U.S. 412 (1908); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Craig v. Boren*, 429 U.S. 190 (1976); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Califano v. Webster*, 430 U.S. 313 (1977).

In this circumstance, I would turn to the issue whether § 287.240, RSMo Supp. 1976, offends Art. I, § 2 of the Missouri Constitution.

In *Poe v. Ullman*, 367 U.S. 497, 542, 543 (1961), Mr. Justice Harlan, in dissent, speaking of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, expressed the view that "it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." He then declared that "the liberty guaranteed by the Due Process Clause * * * is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints * * *, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. * * *."

In Missouri, "all political power is derived from the people" (Mo. Const. Art. I, § 1), and the power granted by the Constitution "is intended to promote the general welfare of the people" (Mo. Const. Art. I, § 2); but "all persons * * * are entitled to equal rights and opportunity under the law" (Mo. Const. Art. I, § 2). These provisions represent a balance which Missouri has struck between "the demands of organized society" and the entitlement of individuals to "equal rights and opportunity under the law." In simplistic terms, it is the primary function of the legislative department to address "the demands of organized society," and the primary function of the judicial department to assure individuals "equal rights and opportunity under the law * * *." Mr. Justice Harlan's view would involve "particularly careful scrutiny of the state needs asserted to justify" a denial of "equal rights and opportunity

under the law. * * *." Mr. Justice Harlan's approach is not permissible in Missouri. The judicial department may not exercise any power properly belonging to the legislative department. (Mo. Const. Art. II, § 1).

The determination of a question whether "the demands of organized society," as reflected by a particular statute, are sufficient to justify an abridgment of a right reserved to the people is an appropriate exercise of a governmental function by the legislative department and is entitled to considerable deference.

The determination of the *extent* to which a right reserved to the people may be abridged by a statute, if at all, is an exercise of the judicial function, and should be conclusive on the question of the constitutionality of that statute. The judicial department is the ultimate protector of the rights of individuals.

The problem of determining the extent to which a right reserved to the people may be abridged by a statute, if at all, is a difficult one. The "demands of organized society" are probably not *relevant* to the judicial inquiry. The protection of individual rights from abridgments by statute does not lend itself easily to the construction and application of a formula. Hopefully, the Bench and Bar will address the problem. Historically, in Missouri, gender-based discriminations are held to be matters for legislative determination that cannot be considered by the courts. *Brawner v. Brawner*, 327 S.W.2d 808, 815 (Mo. banc 1959). In my view, the law should be changed so that, *as a minimum*, if a statute, which purports to satisfy the demands of organized society, *invidiously* discriminates between male and female persons, those demands and perceived needs should yield and the statute should be declared unconstitutional. *King v. Swenson*, 423 S.W.2d 699, 705 (Mo. banc 1968); Cf. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955).

It is worth noting that "exclusive appellate jurisdiction in all cases involving the validity of * * * a statute or provision of the

Constitution of this State" is in this Court (Mo. Const. Art. V, § 3). Until a formula evolves, the people of Missouri have a right to expect that the judges of this Court would not "draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function." *Rochin v. California*, 342 U.S. 165, 170 (1952); see Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921).

In final analysis, "[e]ach new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed." *Poe v. Ullman, supra*, 367 U.S. at 544 (Harlan, J., dissenting).

I concur only in the result.

ROBERT T. DONNELLY, Judge

Supreme Court of Missouri
en banc

Paul J. Wengler,
Respondent,
vs.
Druggists Mutual Insurance Company,
and
Dicus Prescription Drugs, Inc.,
Appellants.
No. 60442

DISSENTING OPINION

(Filed June 27, 1979)

I respectfully dissent. I would hold the statute unconstitutional as violative of the equal protection clause of both the Missouri and federal constitutions and would require death benefits be awarded surviving husbands on the same basis as they are presently awarded widows. I think the matter is well put in Passante v. Walden Printing Co., 53 A.D. 2d 8, 385 N.Y. Supp. 2d 178, 180-81 (1976), as follows:

> "[I]t is clear that the staute before us discriminates against the married woman whose employment contributes to the economic well-being of her family; whereas the working man, as a benefit of employment, is given the security of knowing that in the event of his work-related death, his widow, and therefore in most cases his family, will not suffer the loss of his entire income, the working woman is given no such guarantee . . .
>
> ". . . The disadvantage is most apparent in the present case, where Mr. and Mrs. Passante each earned approximately $200 per week. Had Mr. Passante died in a compensable circumstance, his family, through his widow, would have received, in addition to benefits payable on behalf of minor children, at least $156 per month . . . But because Mrs. Passante was the unfortunate victim, the family's resources will be less by the aforementioned amount, simply because the statute arbitrarily classifies the husband as breadwinner and consequently categorizes the wife's work as unimportant."

The point is made in Arp v. Workers' Compensation Appeals Board, 138 Cal. Rptr. 293, 563 P. 2d 849, 855 (1977) in these words: ". . . On balance, the employed woman is short-changed. While her male colleagues are assured that in the event of a fatal industrial accident their widows—even fully self-supporting widows—will receive a financial cushion, the employed woman can provide her husband with no such security. He will receive benefits only [to] the extent that he can prove dependency, and if he is himself employed he may be eligible for no supplemental death benefit whatever."

The majority distinguishes Frontiero v. Richardson, 411 U.S. 677 (1973); *Arp v. Workers' Compensation Appeals Board*, 563 P. 2d 849, and *Passante v. Walden Printing Co.*, 385 N.Y.S. 178, on the basis that they adopt a strict scrutiny standard. Instead, the majority applies a "substantial relationship" test. It then goes on to hold that since more women than men are dependent on their spouses for support, the legislature was justified in requiring widowers of working women to prove support, but not widows of working men.

There are several flaws in this argument. First, while in *Frontiero* only four members of the court concurred that sex is a suspect classification, four other members of the court concluded that the discrimination presented in that case could not pass even a more lax standard. *Frontiero*, 411 U.S. at 691-

92. Thus, in *Frontiero* eight members of the court concluded that the statutory scheme was in violation of the equal protection clause because of the discrimination against women it permitted. As the description of *Frontiero* contained in the majority opinion makes clear, the discrimination present in that case and this one are remarkably similar. There, as here, the wife was entitled to benefits automatically while the husband would be entitled only upon proof of dependency.

Weinberger v. Wisenfeld, 420 U.S. 636 (1975) and Califano v. Goldfarb, 430 U.S. 199 (1977), are distinguished on the basis that they dealt with the social security act and thus with a form of social insurance. However, in *Weinberger* the court stated:

> "The gender-based distinction made by § 402(g) is indistinguishable from that invalidated in Frontiero v. Richardson . . . Schlesinger v. Ballard, 419 U.S. 498 (1975) explained: 'In . . . *Frontiero* the challenged [classification] based on sex [was] premised on overbroad generalizations that could not be tolerated under the Constitution. . . . [T]he assumption . . . was that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not.' *Id.*, at 507. A virtually identical 'archaic and overbroad' generalization, *id.*, at 508, 'not . . . tolerated under the Constitution' underlies the distinction drawn by § 402(g), namely, that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support." 420 U.S. at 642-43.

The majority states at the conclusion of its opinion:

> "It seems rather obvious therefore that the purpose of the conclusive presumption of dependency was to satisfy

> a *perceived need widows generally had, which need was not common to men whose wives might be killed while working.* . . .
>
> . . . .
>
> "The widower is not deprived of death benefits upon the compensable death of his wife but is entitled to the same *upon proof of dependency*. In our opinion, the *substantive difference in the economic standing* of working men and women justifies the advantage that sec. 287.240 (4)(a) administratively gives to a widow." (emphasis added).

The quoted portions of *Weinberger* make clear that the Supreme Court has rejected just such reasoning as that advanced by the majority in support of the result reached. Regardless whether the standard to be applied is one of strict scrutiny or substantial relationship, administrative convenience and overbroad characterizations of the male as the primary breadwinner cannot serve to counterbalance or justify "a gender-based distinction which diminishes the protection afforded to women who do work." *Weinberger* at 648.

. . . . . .

Robert E. Seiler, Judge

APPENDIX B

Clerk of the Supreme Court
State of Missouri
Jefferson City, Missouri 65101

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

Mail
P. O. Box 150

July 17, 1979

Mr. John W. Reid, II
148 East Main
Fredericktown, Missouri 63645

In Re: Paul J. Wengler v. Druggists Mutual Insurance Company
Dicus Prescription Drugs, Inc.—No. 60,442

Dear Mr. Reid:

This is to advise that the Court this day has made the following order in the above-entitled cause:

"Respondent's motion for rehearing overruled."

Very truly yours,
/s/ THOMAS SIMON
Clerk

cc: Ralph C. Kleinschmidt & Gerre Langton

APPENDIX C

In the Supreme Court of Missouri

Paul J. Wengler,
Plaintiff-Appellant,
vs.
Druggists Mutual Insurance Company, (Insurer) and Dicus Prescription Drugs, Inc., (Employer),
Defendants-Appellants.
No. 60,442.

In the Circuit Court of Missouri
Twenty-Fourth Judicial Circuit—Division I
Honorable Stanley J. Murphy, Judge

Paul J. Wengler,
Plaintiff-Dependent,
vs.
Druggists Mutual Insurance Company, (Insurer) and Dicus Prescription Drugs, Inc., (Employer),
Defendants.
No. 4543.

Transcript on Appeal

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Schnapp, Graham & Reid
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Fredericktown, Missouri 63645
Attorneys for Plaintiff-Appellant

Mr. Clinton B. Roberts
Roberts & Roberts
8 South Jefferson
Farmington, Missouri 63640
Attorneys for Defendants-Appellants

William C. Morris
Official Reporter, Division I
Circuit Court of Missouri, 24th Judicial Circuit

Therefore, on October 17, 1977, a Judgment was filed by the Honorable Stanley J. Murphy as follows:

JUDGMENT

This matter comes before this Court on appeal by the Plaintiff-Dependent, Paul J. Wengler, from the Industrial Commission of the State of Missouri pursuant to 1969 Missouri Revised Statute 287.490. This was initially tried before Judge Edwin Ragland, Division of Workmen's Compensation and the parties stipulated to the facts. Plaintiff-Dependent was represented by John W. Reid, II, of Schnapp, Graham & Reid, Attorneys at Law, 148 East Main Street, Fredericktown, Missouri, and the Insurer, Druggists, Mutual Insurance Company and the Employer, Dicus Prescription Drugs, Inc., was represented by Clinton B. Roberts, of Roberts & Roberts, Attorneys at Law, 8 South Jefferson, Farmington, Missouri.

The matter was submitted to the Court based upon the transcript and stipulations and findings of the Referee and the Industrial Commission on October 6, 1977. The Court having reviewed the stipulations, the transcripts, and the briefs filed by the parties, find that the deceased employee, Ruth Mae Wengler, was crossing Employer, Dicus Prescription Drugs, Inc's parking lot on her way home from work when she was struck by an automobile operated by Denver Brixey at approximately 5:15 p.m. on February 11, 1977, and she died shortly thereafter. Mrs. Wengler earned and was paid by her Employer, Dicus Prescription Drugs Inc., at the time of her death, $69.00 per week, and in addition the Employer provided the employee, Ruth Mae Wengler, with medical coverage with Blue Cross in the sum of $88.85 per month. The Plaintiff-Dependent at the time of Ruth Mae Wengler's death was married to her and survives her and said Plaintiff-Dependent was not and is not dependent for his support either totally or partially on the earnings during

Ruth Mae Wengler's lifetime, and was not and is not physically or mentally incapacitated from wage earnings, and there are no minor children surviving Ruth Mae Wengler.

The parties further stipulated that Denver Drixey's insurance carrier, American Family Insurance Company has paid $10,000 to Paul J. Wengler under a liability policy and said payment was made pursuant to 1969 Missouri Revised Statute 287.150. Plaintiff-Dependent, Paul J. Wengler, is to receive credit in the amount of $500.00 as a necessary and reasonable attorney fee in accordance with 1969 Missouri Revised Statute 287.150, and Defendants, Druggists Mutual Insurance and Dicus Prescription Drugs, Inc., are entitled to a credit of $9,500.00 under 1969 Missouri Revised Statute 287.240.

The Court further finds the parties stipulated that Defendants, Employer and Insurer, have paid burial expenses in the amount of $2,000.00 to Wilson Funeral Home, Fredericktown, Missouri, as provided for in 1969 Missouri Statute 287.240.

The Court does further find from all the evidence that Employee, Ruth Mae Wengler, sustained injuries resulting in her death by accident arising out of and in the course of her employment with Dicus Prescription Drugs, Inc. on February 11, 1977. The Court further finds that Employee, Ruth Mae Wengler, sustained an unexpected, unforeseen event that happened suddenly and violently causing injuries resulting in her death. The Court further finds that employee's accident was a natural reasonable incident of her employment and was a rational consequence of some hazard connected with her employment. The Court further finds said accident occurred within her period of employment at a place where she should have been while she was reasonably fulfilling the duties of her employment. The Court further finds that Employee's average weekly wage was $69.00 per week, and the rate of compensation under the Missouri Workmen's Compensation Law is $46.00 per week, and

further finds that the Blue Cross payments of $88.85 per month by Ruth Mae Wangler's employer was not part of Employee's weekly earnings.

The Court finds that portion of 1976 Missouri Revised Statute 287.240, Paragraph 4, which restricts a husband from Workmen's Compensation benefits unless he is mentally and physically incapacitated as violating the Equal Protection Clause of the United States Constitution and the Missouri Constituiton because a wife is entitled to Workmen's Compensation upon the death of her husband under the Missouri Workmen's Compensation Law without providing that she is mentally or physically incapacitated from wage earnings. It was the opinion of Referee Ragland and the Industrial Commission that the Commission nor the Referee had authority to declare the aforesaid restrictive clause of the death payments under Missouri Workmen's Compensation unconstitutional because an administrative branch of government does not have that authority and only a court can decide whether or not a Statute is unconstitutional. There are no Missouri cases on constitutionality of the restriction to a surviving husband under the Missouri Workmen's Compensation Law; however, there have been two recent cases which are cited by Plaintiff-Dependent from the States of California and New York which have similar Statutes as Missouri on the dependency requirements under Workmen's Compensation Law and said Courts have held said restriction to violate the equal protection clause of the Constitution. See *ARP v. Workers Compensation Appeals Board, 61 CAL.*, APT. 3rd, 29 (1976), and *Passante v. Waldren Printing Company*, 385 N.Y.S. 2nd 178 (1976).

Also, Plaintiff-Dependent has cited the U.S. Supreme Court, Califano v. Goldfarb, 97 S.Ct. 1021 (1977), which holds that a widower was entitled to survivor's benefits under the Social Security Law without showing that he was receiving at least one-half of his support from his deceased wife when she died

due to the fact that the widower was not required under the Social Security Law to show that she was dependent upon her husband at the time of his death.

Accordingly, it is the opinion of this Court that the portion of the 1976 Missouri Revised Statute 287.240 which restricts death benefits of a widower of a deceased wife's Workmen's Compensation benefits to only those surviving husbands who are mentally or physically incapacitated from wage earnings and are dependent upon the wife's wage earnings are unconstitutional because it violates the equal protection clause of the United States Constitution and the Missouri Constitution because the restriction does not apply to the surviving wife in the event of the husband's death. (See Article 14, Section 1, of the United States Constitution and Article 1, Section 2, of the Missouri Constitution.)

WHEREFORE, it is Ordered, Adjudged and Decreed that Plaintiff-Dependent, Paul J. Wengler, recover from Druggists Mutual Insurance Company and Discus Prescription Drugs, Inc., Workmen's Compensation Death Benefits at the rate of $46.00 per week in accordance with the Missouri Workmen's Compensation Law and that the Defendants, Insurer and Employer, be given a credit of $9,500.00 in accordance with 1969 Missouri Revised Statute 287.150 for the settlement with Denver Brixey's insurance carrier for the wrongful death of Ruth Mae Wengler. The costs of these proceedings are taxed against Defendants, Druggists Mutual Insurance Company, Insurer, and Dicus Prescription Drugs, Inc., Employer.

Dated this 13th day of October, 1977.

APPENDIX D

In the Supreme Court of the State of Missouri

Paul J. Wengler, Appellant, vs. Druggists Mutual Insurance Company and Dicus Prescription Drugs, Inc., Appellees.	Missouri Supreme Court Case No. 60442

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Paul J. Wengler, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Missouri Supreme Court overruling appellant's Motion for a Rehearing entered in this suit on July 17, 1979.

This appeal is taken pursuant to United States Code Title 28, Section 1257(2).

Respectfully submitted,

/s/ JOHN W. REID, II
SCHNAPP, GRAHAM & REID
148 East Main Street
Fredericktown, Missouri 63645
314-783-7212
Attorneys for Appellant

I, John W. Reid, II, attorney for Appellant, do hereby certify that I did on the 18th day of July, 1979, by United States Postal Service, with the proper postage affixed, mail a copy of the foregoing Notice of Appeal to the Supreme Court of the United States to Mr. Ralph C. Kleinschmidt, Evans & Dixon, 314 North Broadway, St. Louis, Missouri 63102, attorney for Appellees; to Mr. Thomas F. Simon, Clerk of the Missouri Supreme Court, P. O. Box 150, Jefferson City, Missouri 65101; and to Mr. Michael Rodak, Jr., Clerk of the United States Supreme Court, 1 First Street, N.E., Washington, D.C. 20543.

/s/ John W. Reid, II

Subscribed and sworn to before me this 18th day of July, 1979.

/s/ Norma J. Counts
(Seal) Notary Public

My Commission Expires: April 21, 1980.

APPENDIX E

LABOR AND INDUSTRIAL RELATIONS **287.240**

287.240. Death payments—burial expenses, amount, to whom and when paid—dependent defined—death benefits, how distributed—record of dependents, employer to keep

If the injury causes death, either with or without disability, the compensation therefor shall be as provided in this section:

(1) In all cases the employer shall pay direct to the persons furnishing the same the reasonable expense of the burial of the deceased employee not exceeding two thousand dollars. But no person shall be entitled to compensation for the burial expenses of a deceased employee unless he has furnished the same by authority of the widow or widower, the nearest relative of the deceased employee in the county of his death, his personal representative, or the employer, who shall have the right to give the authority in the order named. All fees and charges under this section shall be fair and reasonable, shall be subject to regulation by the division or the commission and shall be limited to such as are fair and reasonable for similar service to persons of a like standard of living. The division or the commission shall also have jurisdiction to hear and determine all disputes as to the charges. If the deceased employee leaves no dependents the death benefits in this subdivision provided shall be the limit of the liability of the employer under this chapter on account of the death, except as herein provided for burial expenses and except as provided in section 287.140; provided, that in all cases when the employer admits or does not deny liability for the burial expense, it shall be paid within thirty days after written notice, that the service has been rendered, has been delivered to the employer. The notice may be sent by

registered mail, return receipt requested, or may be made by personal delivery;

(2) The employer shall also pay to the total dependents of the employee a death benefit on the basis of sixty-six and two-thirds percent of the employee's average weekly earnings during the year immediately preceding the injury as provided in section 287.250. Compensation shall be payable in installments in the same manner that compensation is required to be paid under this chapter, but in no case be less than at the rate of sixteen dollars per week nor more than one hundred fifteen dollars per week or as provided in section 287.160. If there is a total dependent, no death benefit shall be payable to partial dependents or any other persons except as provided in subdivision (1);

(3) If there are partial dependents, and no total dependents, a part of the death benefit herein provided in the case of total dependents, determined by the proportion of his contributions to all partial dependents by the employee at the time of the injury, shall be paid by the employer to each of the dependents proportionately;

(4) The word *"dependent"* as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee and any death benefit shall be payable to them to the exclusion of other total dependents:

(a) A wife upon a husband legally liable for her support, and a husband mentally or physically incapacitated from wage earning upon a wife; provided, that on the death or remarriage of a widow or widower, the death benefit shall cease unless there be other total dependents entitled to any death benefit under this chapter. In the event of remarriage, a lump sum payment equal in amount to the benefits due for a period of two years shall be

paid to the widow or widower. Thereupon the periodic death benefits shall cease unless there are other total dependents entitled to any death benefit under this chapter in which event the periodic benefits to which said widow or widower would have been entitled had he or she not died or remarried, shall be **Note 3**

divided among such other total dependents and paid to them during their period of entitlement under this chapter;

(b) A natural, posthumous, or adopted child or children, whether legitimate or illegitimate, under the age of eighteen years, or over that age if physically or mentally incapacitated from wage earning, upon the parent legally liable for the support or with whom he is living at the time of the death of the parent. In case there is a wife or a husband mentally or physically incapacitated from wage earning, dependent upon a wife, and a child or more than one child thus dependent, the death benefit shall be divided among them in such proportion as may be determined by the commission after considering their ages and other facts bearing on the dependency. In all other cases questions of total or partial dependency shall be determined in accordance with the facts at the time of the injury, and in such other cases if there is more than one person wholly dependent the death benefits shall be divided equally among them. The payment of death benefits to a child or other dependent as provided in this paragraph shall cease when the dependent dies, attains the age of eighteen years, or becomes physically and mentally capable of wage earning over that age, or until twenty-two years of age if the child of the deceased is in attendance and remains as a full-time student in any accredited educational institution, or if at eighteen years of age the dependent child is a member of the armed forces of the United States on active duty; provided, however, that such dependent child shall be entitled to compensation during four years of full-time attendance at a fully accredited educational institution to commence prior to twenty-three years of age and immediately upon cessation of his active duty in the armed forces, unless there are other total dependents entitled to the death benefit under this chapter;

(5) The division or the commission may, in its discretion, order or award the share of compensation of any such child to be paid to the parent, grandparent, or other adult next of kin or legal guardian of the child for the latter's support, maintenance and education, which order or award upon notice to the parties may be modified from time to time by the commission in its discretion with respect to the person to whom shall be paid the amount of the order or award remaining unpaid at the time of the modification;

(6) The payments of compensation by the employer in accordance with the order or award of the division or the commission shall discharge the employer from all further obligations as to the compensation;

(7) All death benefits in this chapter shall be paid in installments in the same manner as provided for disability compensation;

(8) Every employer shall keep a record of the correct names and addresses of the dependents of each of his employees, and upon the death of an employee by accident arising out of and in the course of his employment shall so far as possible immediately furnish the division with said names and addresses.
Amended by Laws 1965, p. 397, § 1; Laws 1965, p. 414, § 1; Laws 1967, p. 384, § 1; Laws 1969, p. 393, § 1; Laws 1971, p. 307, § 1; Laws 1974, p. 853, § 1; Laws 1975, p. 285, § 1; Laws 1976, p. —, S.B. No. 708, § 1; Laws 1978, p. 703, H.B. No. 1260, § 1.

Revisor's Note: The maximum weekly installment amount in subdivision (2) was increased to fifty-two dollars in the section as reenacted in Laws 1965, p. 414. Other changes were made identically in 1965 bills.

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3. Persons entitled to compensation

Where employee was killed while crossing railroad tracks on his way to work, employer did not have guards regulating pedestrian traffic along employee's route, and there were no cross-walk lines painted across road which separated railroad tracks from entrance to employer's premises, essential elements for applying extension of premises doctrine were lacking, and employee's survivors were not entitled to * * *

A MOTION TO DISPENSE WITH THE PRINTING OF THE RECORD WAS MADE AND GRANTED. THAT ACCOUNTS FOR THE ABSENCE OF THE APPENDIX WHICH NORMALLY APPEARS AT THIS POINT.

Supreme Court, U.S.
FILED
OCT 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-381

PAUL J. WENGLER,
Appellant,

v.

DRUGGISTS MUTUAL INSURANCE COMPANY, AND
DICUS PRESCRIPTION DRUGS, INC.,
Appellees.

On Appeal from the Supreme Court of Missouri

APPELLEES' MOTION TO DISMISS

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Other Authority:

U.S. Department of Labor, Bureau of Labor Statistics, *U.S. Working Women: a Data Book*, 1977 Bulletin, 1977, Table 39 5

U.S. Department of Labor, Bureau of Labor Statistics, *U.S. Working Women: a Data Book*, 1977 Bulletin, 1977, Table 41 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-381

PAUL J. WENGLER,
Appellant,

v.

DRUGGISTS MUTUAL INSURANCE COMPANY, AND
DICUS PRESCRIPTION DRUGS, INC.,
Appellees.

On Appeal from the Supreme Court of Missouri

APPELLEES' MOTION TO DISMISS

APPELLEES' MOTION TO DISMISS

Appellees, Druggists Mutual Insurance Company and Dicus Prescription Drugs, Inc., move pursuant to Rule 16(b) of the Rules of the Supreme Court of the United States, that the appeal herein taken be dismissed on the grounds that said appeal does not present a substantial federal question.

THE CASE AND ISSUE

This is an appeal from the decision of the Supreme Court of Missouri rejecting appellant's contention that Section 287.240 (4) R.S.Mo., 1976 Supplement, a part of Missouri's Workmen's Compensation Act, denies a widower equal protection of the law afforded by the Constitution of the State of Missouri, Article I, Section 2, and Amendment 14, United States Constitution.

Section 287.240(2)[1] requires that when an injury due to a work related accident causes the death of an employee, the employer pay to the total dependents of the employee a death benefit. Subsection 4 defines the word dependent to mean "a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of injury." The statute creates three classes of persons who are conclusively presumed to be dependent upon the employee for support. They are: a wife upon a husband legally liable for her support, a husband mentally or physically incapacitated from wage earning upon a wife (§ 287.240 (4)(a)), and a child under age 18 upon a parent (§ 287.240 (4)(b)).

Appellant was the husband of Ruth Wengler, whose death was caused by a work related injury. Appellee Dicus Prescription Drugs, Inc. was Mrs. Wengler's employer. Appellee Druggists Mutual Insurance Company is the employer's workmen's compensation insurer, and under Missouri law is primarily liable for payment of benefits. Appellant has stipulated that he was not dependent for support in whole or in part upon the wages of his wife at the time of her death, nor was he mentally or physically impaired from earning wages.

[1] The full text of Section 287.240 is printed in the Jurisdictional Statement, pp. A-28 through A-31.

The workmen's compensation referee and, upon review, the Missouri Labor and Industrial Relations Commission denied appellant's claim for compensation. Upon appeal, the Circuit Court of Madison County, Missouri, reversed, holding that § 287.240 denied appellant equal protection of the law because the act afforded a conclusive presumption of dependency to widows and not to widowers. Subsequently, the Missouri Supreme Court reversed the judgment of the Circuit Court, holding that § 287.240 (4) did not deprive appellant of the equal protection of the law. Appellant then appealed to this Court.

There is No Substantial Federal Question

The Missouri Supreme Court's decision directly follows this Court's decision in *Califano* v. *Webster,* 430 U.S. 313, 51 L.Ed.2d 360, 97 S.Ct. 1192 (1977); *Schlesinger* v. *Ballard,* 419 U.S. 498, 42 L.Ed.2d 610, 95 S.Ct. 572 (1975); *Kahn* v. *Shevin,* 416 U.S. 351, 40 L.Ed.2d 189, 94 S.Ct. 1737 (1974). And contrary to appellant's assertions, the decision of the Missouri Supreme Court in this cause is in harmony with and does not conflict with this Court's decision in *Califano* v. *Westcott,* U.S. , 61 L.Ed.2d 382, 99 S.Ct. 2655 (1979); *Orr* v. *Orr,* U.S. , 59 L.Ed.2d 306, 99 S.Ct. 1102 (1979); *Califano* v. *Goldfarb,* 430 U.S. 199, 51 L.Ed.2d 270, 97 S.Ct. 1021 (1977); *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 43 L.Ed. 2d 514, 95 S.Ct. 1225 (1975); *Frontiero* v. *Richardson,* 411 U.S. 677, 36 L.Ed.2d 583, 93 S.Ct. 1764 (1973).

The Missouri Supreme Court recognized that to withstand scrutiny under the equal protection clause, the different classification afforded widowers under § 287.240 (4) must serve an important governmental objective and must be substantially related to the achievement of those objectives. (Jurisdictional Statement, Appendix, p. A-4).

The Missouri Supreme Court after studying the Missouri Legislature's intent in passing § 287.240 (4) specifically found that "the purpose of the conclusive presumption of dependency was to satisy a perceived need widows generally had, which need was not common to men whose wives might be killed while working." (Jurisdictional Statement, Appendix, p. A-10) The court then stated:

> "***The governmental objective was to require employers to alleviate the economic hardship resulting from a working spouse's death. The hardship was seen by the legislature as more immediate and pronounced on women than on men. Statistics cited by the United States Supreme Court in Kahn v. Shevin, supra, appear to hear this out even today, and the claimant here has not shown any evidence or presented any empirical data to the contrary." [Juris. Statement, Appendix, pp. A-10, A-11]

The Court concluded:

> "***In our opinion, the substantive difference in the econimic standing of working men and women justifies the advantage that § 287.240 (4)(a) administratively gives to a widow." [Juris. Stat., Appendix, p. A-11]

Thus, the Missouri Supreme Court followed the decision of this Court in *Kahn* v. *Shevin,* supra, where this court upheld the constitutionality of a Florida statute which granted a tax exemption to widows and not widowers for the reason that the differing treatment of widows and widowers rested upon a difference having a fair and substantial relation to the object of the legislation. In this Court's opinion, the Florida tax law was reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes the heaviest burden. It was clear to this Court then that "there could be no dispute that the financial difficulties confronting the lone women in Florida or in any other state exceeded those

facing men. Whether from overt discrimination or from socialization process of a male dominated culture, the job market is inhospitable to the women seeking any but the lowest paid jobs." *Kahn* v. *Shevin,* 416 U.S. at 353, 40 L.Ed. at 192.

The status of working women in the work force has not materially changed since the Court decided *Kahn* v. *Shevin.* In 1975, medium annual earnings of fulltime female workers was $7,504.000 and that of a man was $12,631.00. Thus a woman had a medium income in 1975 which was only 59.4% of the medium for men. U.S. Department of Labor, Bureau of Labor Statistics, *U.S. Working Women: A Data Book,* 1977 Bulletin, 1977, Table 39. The data relied upon by this Court in deciding *Kahn* v. *Shevin* indicated that in 1972 a woman had a median income which was only 57.9% of the median for males. *Kahn* v. *Shevin,* 416 U.S. at 353, 40 L.Ed.2d 192, n. 5 and 6. In March 1976, in families where the wife was employed fulltime, the median percent of family income accounted for by her earnings was 38.8%. In families where the wife was employed part-time, the median percent of family income accounted for by her earnings was 11.8%. U.S. Department of Labor, *U.S. Working Women,* supra, Table 41. This data reinforces the conclusion that the loss of the husband's wages fall more disparately upon the widow than does the loss of the wife's wages upon the widower.

The Missouri court's decision was also influenced by this Court's holding in *Califano* v. *Webster,* supra, that a gender-based difference which benefitted women by requiring fewer number of elapsed years for women to acquire old age insurance benefits under the Social Security Act than that required for men to qualify, was not violative of the Equal Protection Clause. The difference in treatment was justified by past discrimination against women in employment.

On the other hand, the Missouri Supreme Court properly found that this Court's decision in *Califano* v. *Goldfarb,* supra, *Weinberger* v. *Wiesenfeld,* supra, and *Frontiero* v. *Richardson,* supra, were not controlling in the present case because the latter cases are distinguishable on their facts. [Juris. Stat., Appendix, pp. A-8 and A-9]. In *Califano* v. *Goldfarb,* this Court characterized the Social Security System as a "program of social insurance". Under the System, covered employees paid taxes into the fund to purchase protection for old age. This Court's principal concern was that the section discriminated against the female wage earner who paid taxes into the fund by providing her family with less protection than that provided a male wage earner. 40 U.S. at 208, 51 L.Ed.2d 276, 277. The Missouri Workmen's Compensation Law is not a system of social insurance financed through taxation. The benefits provided by the Act are substitutional of the injured employee's common law and statutuory rights and remedies in favor of the injured employee or his or her dependents for accident which occur in the course of employment. (Jurisdictional Statement, Appendix, p. A-9) The employee does not contribute to the System. In fact, the Act provides that no part of the cost of the insurance shall be assessed against, collected from or paid by any employee. Section 287.290, R.S. Mo. 1969.

The present case is further distinguishable from *Goldfarb* in that under the Social Security Act, the widower had to show that he had received one-half of his support from his wife at the time of her death, to be eligible for benefits. Under Missouri Workmen's Compansation Statute, a widower who in fact suffers loss of support because of his wife's death due to a job-related injury, is compensated. (Juris. Stat., Appendix, p. A-11).

The advantage given widows under the Missouri Workmen's Compensation Act is more than just administrative. The Act

assures full benefits to widows even though they are only partially dependent upon their husbands.[2] Thus, the effect is to assure full death benefits to those widows who may not have been totally dependent upon their husbands and would have been entitled to only partial benefits. These are the women the Missouri Legislature thought to benefit by the conclusive presumption. [There probably was no presumption on the part of the Missouri Legislature that the insignificant number of non-dependent widows, who received benefits, were needier than non-dependent widowers, who do not.]

This Court's decision in *Weinberger* v. *Wiesenfeld,* supra, can be distinguished for the same reason that *Goldfarb* is distinguishable. The "mothers' benefits" afforded widows and totally denied widowers discriminated against women wage earners who had contributed to the System because their spouses were denied benefits when a male wage earner's spouse was afforded benefits. Furthermore, in the *Weisenfeld* case, this Court found that the purpose of the Legislation was not to compensate women beneficiaries as a group for economic difficulties which still confront women who seek to support themselves, but was intended to permit women to elect not to work and devote themselves to the care of children. 420 U.S. at 650, 43 L.Ed. at 525, 526.

---

[2] Section 287.240(2) excludes payment of benefits to a partial dependent where there are total dependents. Section 287.240(3) provides for payments to partial dependents of an injury employee of death benefits, determined by the proportion of the employee's contribution to all partial dependents by the employee at the time of the injury, which are paid by the employer to each of the dependents proportionally. If a widow is required to show that she is dependent upon her husband, this is what would happen where she could only establish partial dependency: if a husband contributes $200.00 of his $400.00 monthly earnings to his wife for her support, his wife would be entitled to $200/$400 or 50% of the total death benefits due. See *Gantner* v. *Fayette Brick & Tile Co.,* 236 S.W.2d 415 (Mo.App. 1951).

In *Frontiero* v. *Richardson,* supra, the offending gender based classification which required the female member of the military service to show that her husband was dependent upon her for more than one-half of his support in order to qualify for quarters allowance and dependent medical and dental benefits, but presumed that male members' spouses were dependent is distinguishable from the present case. In *Frontiero,* the disparate treatment between male and female personnel in no way compensated a female for past disparate economic treatment. The Missouri Supreme Court has found tht the information available to the Missouri Legislature about the conditions of women in Missouri in the 1920's and 1930's supported the concept that a widow was more in need of prompt payment of death benefits upon her husband's death without drawn-out proceedings to determine the amount of dependency than was a widower. This need persists today. [Juris. Stat., Appendix, p. A-10]. Thus, there is a valid reason for treating widows and widowers differently in the present casee, which was lacking in the *Frontiero* case.

The same analysis can be applied to *Califano* v. *Westcott,* U.S. , 61 L.Ed.2d 382, 99 S.Ct. 2655 (1979). In *Westcott,* the statute provided benefits to families whose dependent children had been deprived of parental support because of the father's unemployment, but did not provide such benefits when the mother was unemployed. There was no contention that the purpose of the legislation was to compensate for the disparity between the economic capabilities of a man or a women.

In *Ore* v. *Ore,* U.S. , 59 L.Ed.2d 306, 99 S.Ct. 1102 (1979), Alabama's statutes which provide that husbands and not wives may be required to pay alimony upon divorce discriminated against those males who because of their financial circumstances were in need of support. Missouri Workmen's

Compensation Law compensates all widowers who are mentally and physically incapacitated from earning a living, and those who can actually show that they were dependent in part or in whole upon their wife for support. Thus, entitlement is not denied needy males under the Missouri law while it was denied needy males under the Alabama statutes.

The Missouri Supreme Court, in holding the Missouri Statute constitutional, found that the different treatment afforded widows in assuring them benefits whether totally, partially or non-dependent upon their spouses without a drawn-out proceeding serves an important governmental objective—that of alleviating the economic hardship resulting from a working spouse's death, a hardship that was more immediate and pronounced on women than on men. In reaching this conclusion, the Supreme Court of Missouri recognized that the Missouri Legislature must strike a delicate balance in deciding the amount of compensation it would require employers to pay upon injury to employees, resulting in death. This Court has uniformly recognized that the courts will not substitute their social and economic beliefs for the judgment of the legislative body which was elected to pass laws. *Kahn* v. *Shevin,* supra, 416 U.S. 356, n. 9, citing *Ferguson* v. *Skrupa,* 372 U.S. 726, 730 10 L.Ed.2d 93, 83 S.Ct. 1028, 95 ALR 2d 1347.

CONCLUSION

The classification adopted by the Missouri Legislature in enacting 287.240 (4)(a) of the Missouri Workmen's Compensation Statutes, is well within the permissible limits long recognized by this Court. The contention that as applied to appellant it denies the equal protection of the laws in violation of the Fourteenth Amendment presents no substantial federal ques-

tion. Appellees' motion to dismiss the appeal should therefore be sustained.

Respectfully submitted,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-381

PAUL J. WENGLER,
Appellant,

vs.

DRUGGISTS MUTUAL INSURANCE COMPANY, AND
DICUS PRESCRIPTION DRUGS, INC.,
Appellees.

On Appeal from the Supreme Court of Missouri

APPELLANT'S BRIEF

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OPINIONS BELOW

The opinion of the Missouri Supreme Court entered June 27, 1979, motion for rehearing overruled July 17, 1979, and the opinion of the Circuit Court of Madison County, Missouri, are set out in the Appendix (Jurisdictional A1 through A19). The decision of the Missouri Supreme Court is reported as *Wengler* v. *Druggists Mut. Ins. Co.,* 583 S.W. 2d 162 (Mo., 1979).

JURISDICTION

This action for workers' compensation death benefits draws in question the validity of 1976 Revised Statutes of Missouri Section 287.240 on the ground that the gender line the statute invokes is repugnant to the equal protection clause of the fourteenth amendment to the Constitution of the United States. The statute denies benefits to a widower absent mental or physical incapacity or proof of his actual dependency upon his wife's wages for his support; it accords full benefits to a widow by conclusively presuming her to be totally dependent upon her husband's wages for her support.

The federal constitutional question was timely raised by Appellant before the case was submitted to the Administrative Law Judge (Workmen's Compensation TR 7) and has continuously been raised on appeal (*Wengler,* supra). On October 13, 1977, the Circuit Court of Madison County, Missouri, held for Appellant Wengler, ruling that the equal protection clauses of the Missouri and Federal Constitutions required death benefits for a man whose wife dies in a work-related accident on the same terms as Missouri provides for a woman whose husband dies in a work-related accident (Cir. Ct. TR 2-9). On June 27, 1979, the Missouri Supreme Court reversed; the majority declared the gender classification valid and not repugnant to the Federal Constitution. The dissenting opinion of Justice Seiler states the majority failed to follow the recent U.S. Supreme court cases deciding gender-based discrimination (*Wengler,* supra).

A timely motion for rehearing, filed by Appellant Wengler on July 6, 1979, was overruled by the Missouri Supreme Court on July 17, 1979. Notice of appeal to this Court was timely filed on July 19, 1979 (Juris. Stat. App., pp. 20, 26, 27).

The jurisdiction of the U.S. Supreme Court to review this decision of the Supreme Court of Missouri on appeal is conferred by 28 U.S.C. Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Stanton* v. *Stanton,* 421 U.S. 7 (1975); *Duren* v. *Missouri,* 99 S.Ct. 664 (1979); *Orr* v. *Orr,* 99 S.Ct. 1102 (1979). Probable jurisdiction was noted by the Supreme Court of the United States on October 29, 1979.

STATUTE INVOLVED

1976 Revised Statutes of Missouri Section 287.240 is set out in full in the Jurisdictional Appendix at pages 28 through 31. In relevant part, the statute provides:

. . .

> (2) The employer shall . . . pay to the . . . dependents of the employee a death benefit . . .
>
> (4) The word "dependent" as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee and any death benefit shall be payable to them to the exclusion of other total dependents;
>
> > (a) A wife upon a husband legally liable for her support, and a husband mentally or physically incapacitated from wage earning upon a wife; . . .

CONSTITUTIONAL PROVISION

Article 14, Section One of the U. S. Constitution, reads as follows:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they

reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

Whether 1976 Revised Statutes of Missouri Section 287.240, which authorizes workers' compensation death benefits for the spouse of a male worker without regard to dependency, but conditions benefits for the spouse of a female worker upon mental or physical incapacity or proof of dependency, discriminates impermissibly on the basis of gender in violation of the equal protection clause of the fourteenth amendment to the United States Constitution.

STATEMENT OF THE CASE

Ruth Wengler, wife of Appellant Paul J. Wengler, was killed in an accident while working for Appellee, Dicus Prescription Drugs, Inc. (Div. Workmen's Comp. Tr. 2, 3). Appellant Paul J. Wengler made a claim for Workers' Compensation Death Benefits under 1976 Revised Statutes of Missouri Section 287.240 (Div. Workmen's Com. TR 1 and 2). Prior to the July 21, 1977, hearing before the referee, widower Paul J. Wengler filed a memorandum of law setting forth that Section 287.240 violated the equal protection clause of the Federal Constitution; at the hearing, the referee noted that the constitutionality of Section 287.240 was at issue (Div. Workmen's Com. Tr 8).

Under the Missouri law in question, a widower may not obtain periodic workers' compensation death benefits unless he (1) is mentally or physically incapacitated from wage earning; or (2) proves actual dependency upon his wife's wages. By contrast, the Missouri law conclusively presumes a widow totally dependent upon her husband's wages; she qualifies for periodic workers' compensation death benefits without regard to actual dependency. It was stipulated that Appellant Paul J. Wengler was not actually dependent for support in whole or in part upon the wages of his wife at the time of her death nor was he mentally or physically impaired from wage earning (Div. Workmen's Com. TR 3).

On August 4, 1977, the referee denied benefits to Appellant Wengler on the sole ground that he did not meet the sex-specific statutory requirement of incapacity or dependency (See Award on Hearing). On review, the Missouri Labor and Industrial Relations Commission, September 9, 1977, adopted the referee's award and denied compensation (See Award of Labor and Industrial Commission). On October 13, 1977, the Circuit Court of Madison County, Missouri, reversed. The Circuit Court of Madison County, Missouri, held Section 287.240 denied Paul J. Wengler the equal protection of the laws in violation of the Missouri and Federal Constitutions because the statute conclusively presumes the total dependency of a widow upon a husband who dies in a work-related accident, but denies that same presumption to a widower whose wife dies in a work-related accident (Cir. Ct. TR 2 through 9).

On June 27, 1979, the Missouri Supreme Court reversed the judgment of the Circuit Court of Madison County, Missouri. In a 5-1 decision, the Missouri Supreme Court upheld the gender line drawn by Section 287.240, mandating dissimilar treatment of workers and their spouses, solely on the basis of sex. *Wengler,* supra.

The Missouri Supreme Court majority in *Wengler,* supra, acknowledged this Court's condemnation in *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975), and *Califano* v. *Goldfarb,* 430 U.S. 199 (1977), of legislation based on "archaic and overbroad generalizations," statutes "casting female wage earners in a light which denigrates their economic contributions to their

families' support." It also acknowledged the inconsistency of its decision with those of the three state courts that have recently applied *Wiesenfeld* and *Goldfarb* to invalidate proof-of-dependency requirements imposed on widowers, but not widows, under workers' compensation statutes. *Tomarchio* v. *Township of Greenwich,* 75 N.J. 62, 379 A.2d 848 (1977); *Arp* v. *Workers' Comp. Appeals Bd.,* 19 Cal. 3d 395, 563 P. 2d 849 (1977); *Passante* v. *Walden Printing Co.,* 53 App. Div. 2d 8, 385 N.Y.S. 2d 178 (1976). But it disposed of the judgments of this Court and others as "(i)n most instances" arriving at "self-serving conclusions."

ARGUMENT

It is not disputed had Appellant (Mr. Wengler) been employed by Dicus Prescription Drugs, Inc. and died as a result of a work-related accident, his widow would have automatically received the death benefits provided for under the Missouri Workmen's Compensation statutes, 1976 R.S.Mo. §287.240 without any proof of being dependent upon him or proving any mental or physical handicap.

However, since the Appellant's gender in this case is male, the Missouri Workmen's Compensation benefits under 1976 R.S.Mo. §287.240 are denied unless there is proof that Appellant-widower was dependent upon his deceased wife or he is mentally or physically incapacitated.

Although this has been the law in the State of Missouri since 1925 (Jur.App. p. 3), it fundamentally is not fair and flies in the face of the equal protection clause of the United States Constitution.

On June 25, 1979, the U.S. Supreme Court in *Califano* v. *Wescott,* 99 S.Ct. 2655 (1979), unanimously declared unconstitutional a gender line drawn in the context of public assistance unemployed parent benefits. The Court held that explicit sex classification statutes must fall which reflect the "baggage of sexual stereotypes" which presume that men have "primary responsibility to provide a home and its essentials", and women are the "center of the home and family life." *Califano* v. *Wescott,* 99 S.Ct. 2655 at 2663 (1979).

The aforesaid language the Court used in the *Wescott* case was not a new view or theory because the plurality used similar language in other cases prior to the *Wescott* case, supra. For example, see:

(1) *Orr* v. *Orr,* 99 S.Ct. 1102, at page 1112 (1979) declaring State statute providing alimony only to wife and not to husbands as violating the equal protection clause.

(2) *Califano* v. *Goldfarb,* 97 S.Ct. 1021 at 1029 (1977) declaring requirement of social security benefits as violating equal protection clause where widow automatically received benefits but widower had to prove 50% dependency on deceased wife's wages before he was entitled to benefits.

(3) *Craig* v. *Boren,* 97 S.Ct. 451, 457 (1976) declaring liquor law unconstitutional which permitted females to drink at age 18 and males not until age 21.

(4) *Weinberger* v. *Wisenfeld,* 95 S.Ct. 1225 at 1235 (1975) declaring unconstitutional the social security provision allowing benefits for the caretaking of a deceased wage earner's child to its mother but denying benefits to its father.

(5) *Frontiero* v. *Richardson,* 93 S.Ct. 1764 at 1770 and 1771 (1973) declaring Federal statute violating equal protection clause which allowed more fringe benefits to married men in the military than to married women.

(6) *Reed* v. *Reed,* 92 S.Ct. 251 at 254 (1971) declaring State statute unconstitutional that gave men preference over women on administration of estates because it violated equal protection clause of the constitution.

Applying the equal protection principle as elaborated in this Court's 1970s gender classification precedent, three state courts other than Missouri invalidated proof-of-dependency requirements state workers' compensation laws imposed on

widowers but not widows. *Tomarchio* v. *Township of Greenwich,* 75 N.J. 62, 379 A. 2d 843 (1977); *Arp* v. *Workers' Comp. Appeals Bd.,* 19 Cal. 3d 395, 563 P. 2d 849 (1977); *Passante* v. *Walden Printing Co.,* 53 App. Div. 2d 8, 385 N.Y.S. 2d 178 (1976). Only Missouri continues to march to a different tune. Cf. *Duren* v. *Missouri,* 99 S.Ct. 664 (1979). No other jurisdiction, in the wake of *Frontiero* and *Wiesenfeld,* supra, and *Califano* v. *Goldfarb,* 430 U.S. 199 (1977), has aligned itself with the majority below. See Note, 9 U. Mich., J. L. Ref. 138 (1975) (workers' compensation laws in most states extend conclusive presumption of dependency to widower and widow alike).

The Missouri Supreme Court purported to distinguish "the social security cases" *(Wiesenfeld* and *Goldfarb)* on the ground that the benefits to surviving spouses there at issue were "social insurance," "based upon mandatory contributions from past wage earnings of the employee." That distinction, wispy in any event, could hardly be approved on the date of the decision below, June 27, 1979, and surely not on July 17, 1979, when rehearing was denied. Because on June 25, 1979, this Court, in *Califano* v. *Wescott,* supra, unanimously declared unconstitutional a gender line drawn in the context of public assistance unemployed parent benefits. Those benefits were not tied to any "contributions from past wage earnings of the employee."

The California Supreme Court in *Arp,* supra, at page 855, answered the contribution argument as follows:

> "It is true that Mrs. Arp, unlike the deceased wives in *Goldfarb* and *Wiesenfeld,* did not contribute a portion of her earnings to the fund from which her husband is now denied benefits. Section 3751 of the Labor Code prohibits employee contributions. However, the right to compensation insurance coverage arises from 'the relationship of employer and employee itself' (*Noe* v. *Travelers Ins. Co.*

(1959) 172 Cal. App. 2d 731, 733, 342 P. 2d 976, 977; *Shipbuilding etc. Co.* v. *Indus. Acc. Com.*, (1922) 57 Cal. App. 352, 357-358, 207 P. 416), and is, at least in this sense, part of the wage-and-benefits package an employee receives. Thus, under section 3501, subdivision (a), the position held by a working woman with an employed spouse may well generate a smaller sum total of economic benefits than the same job held by a working male with an employed spouse. Since it is estimated that in more than half the families in the United States both husband and wife are wage earners (U.S. Bureau of Census, Statistical Abstract of the U.S., supra, p. 346), the negative potential of section 3501, subdivision (a), is obvious and substantial."

The U.S. Supreme Court has developed three tests to determine whether a statute violates the equal protection clause of the U.S. Constitution.

1. "*Strict Scrutiny Test*" (used where fundamental constitutional rights or classification based on race, alienage, or national origin are involved). It requires proof that the statutory classification is necessary for achievement of some compelling state interest to survive the constitutional attack.

2. "*Rational Basis Test*" (used in cases where fundamental rights or suspect classifications are not in issue). Under this test the legislative classifications are upheld unless they are patently arbitrary, bearing no rational relationship to a legitimate government interest.

3. "*Substantial Relationship Test*" (used in gender classification cases). Under this test the legislation must serve important governmental objectives and must be substantially related to the achievement of those objectives.

For a scholarly discertation of the three tests, see 46 University of Cincinnati Law Review 572 (1977) *Gender-Based Discrimination and a Developing Standard of Equal Protection*

Analysis; 1 Washington University Law Quarterly 161 (1979), *Sexual Equality Under the Fourteenth and Equal Rights Amendments;* 52 Tulane Law Review 451 (1978) *Sex Equality and the Constitution.*

The majority of the Missouri Supreme Court declined to adopt the Strict Scrutiny Test which was used by the New York Supreme Court in *Passante* v. *Walden Printing Co.*, 385 N.Y.S. 2d 178 (1976); and the California Supreme Court in *Arp* v. *Workers' Compensation Appeals Board,* 563 P. 2d 849 (Cal., 1977), see *Wengler* v. *Druggist Mut. Ins. Co.*, 583 S.W. 2d 162, 167 (Mo., 1979) and found that the Missouri gender based distinction on death benefits met the substantial relationship test. *Wengler,* supra, at 164 and 168.

In applying the substantial relationship test, the majority of the Missouri Supreme Court in the *Wengler* case, supra, cited for authority *Califano* v. *Webster,* 97 S.Ct. 1192 (1977) which unanimously held that a provision of the Social Security Law gender based distinction which excluded three more lower earning years for a female than a male in establishing monthly wages did not violate the equal protection clause because Congress deliberately enacted said provision to compensate for particular economic disabilities suffered by women and said provision was not the accidental by-product of a traditional way of thinking about females. The majority also relied on *Kahn* v. *Shevin,* 94 S.Ct. 1734 (1974) wherein the U.S. Supreme Court in a 5 to 4 decision found a $500.00 annual tax exemption to widows but not providing a similar exemption to widowers did not violate the equal protection clause primarily because it involved taxes. And finally, the majority cited as authority *Weinberger* v. *Salti,* 95 S.Ct. 2457 (1975) a 5 to 4 decision holding that Social Security Law did not violate the equal protection clause of the U.S. Constitution by requiring that a widow and a step-child, before being entitled to Social Security benefits of deceased, the widow must have been married to deceased for at least nine months prior to his death.

It is the Appellant's position that Justice Sieler, the sole dissenter in the *Wengler* case, was correct in his opinion citing for authority the following language from the New York and California Supreme Courts at page 170, to-wit:

> ". . . I think the matter is well put in *Passante* v. *Walden Printing Co.,* 53 A.D. 2d 8, 11-12, 385 N.Y.S. 2d 178, 180-81 (1976), as follows:
>
> " '[I]t is clear that the statute before us discriminates against the married woman whose employment contributes to the economic well-being of her family; whereas the working man, as a benefit of employment, is given the security of knowing that in the event of his work-related death, his widow, and therefore in most cases his family, will not suffer the loss of his entire income, the working woman is given no such guarantee. . . .
>
> " '. . . The disadvantage is most apparent in the present case, where Mr. and Mrs. Passante each earned approximately $200 per week. Had Mr. Passante died in a compensable circumstance, his family, through his widow, would have received, in addition to benefits payable on behalf of minor children, at least $156 per month . . . But because Mrs. Passante was the unfortunate victim, the family's resources will be less by the aforementioned amount, simply because the statute arbitrarily classifies the husband as breadwinner and consequently categorizes the wife's work as unimportant.'
>
> "The point is made in *Arp* v. *Workers' Compensation* Appeals Board, 19 Cal. 3d 395, 138 Cal. Rptr., 293, 563 P. 2d 849, 855 (1977) in these words: '. . . On balance, the employed woman is short-changed. While her male colleagues are assured that in the event of a fatal industrial accident their widows—even fully self-supporting widows—will receive a financial cushion, the employed woman can provide her husband with no such security. He will receive benefits only [to] the extent that he can prove dependency, and if he is himself employed he may be eligible for no supplemental death benefit whatever.' "

The U.S. Supreme Court justices have used different tests, but have found that the following gender based distinctions violate the equal protection clause of our Constitution, which involve employment related matters such as administration of estates, employment fringe benefits, social security benefits and welfare benefits, to-wit:

1. *Reed* v. *Reed,* 92 S.Ct. 251 (1971) unanimously holding statute giving gender perference on administration of estates violated equal protection clause.
2. *Frontiero* v. *Richardson,* 935 S.Ct. 1764 (1973) Eight to one decision declaring Federal statute violated equal protection clause which allowed more fringe benefits to married men in the military than to married women.
3. *Weinberger* v. *Wiesenfeld,* 95 S.Ct. 1225 (1975) unanimously held the Social Security provision allowing benefits for the care taking of a deceased wage earner's child to its mother but not to its father violated the equal protection clause.
4. *Califano* v. *Goldfarb,* 97 S.Ct. 1021 (1977) in a 5 to 4 decision declared requirements of Social Security benefits as violating equal protection clause where widows automatically receive benefits but widowers only if they prove they were at least 50% dependent on deceased wife's wages.
5. *Orr* v. *Orr,* 99 S.Ct. 1102 (1979) in 6 to 3 decision held a State's alimony statute violated equal protection clause where husbands could not collect alimony.

6. *Califano* v. *Wescott,* 99 S.Ct. 2655 (1979) unanimously held Federal aid to dependent children statute violated equal protection clause where benefits were payable to family when father was out of work but not when mother was out of work.

From the six immediately preceding U.S. Supreme Court cases, it is clear that a statute which denies to one sex *equal justice under the law* involving employment fringe benefits, social security benefits, welfare benefits, equal right to administer estates, will be found to violate the equal protection clause of our Constitution by our Supreme Court.

Justice Sieler of the Missouri Supreme Court was correct when he stated in *Wengler,* supra, at page 171, the following:

> "Regardless whether the standard to be applied is one of strict scrutiny or substantial relationship, administrative convenience and overbroad characterizations of the male as the primary breadwinner cannot serve to counterbalance or justify a gender-based distinction which diminishes the protection afforded to women who do work. *Weinberger* at 648, 95 S.Ct. at 1233.

The Appellant is confident the Justices will grant him what is carved in the marble over the entrance to the U.S. Supreme Court Building, to-wit: "Equal Justice Under the Law" and find that the Missouri Workmen's Compensation Death Benefits gender based distinction violates the Equal Protection Clause of our Constitution. In so holding, not only Appellant will have won, but all those American families who have been called the silent majority, the working, law-abiding, tax-paying husbands and wives trying to keep ahead of inflation, supporting and educating their children, a group of people without a lobby, organization, committee, trust or foundation to advance their ideas and views will be the real winners. They are made up

of all races, national origins and creeds; they are made up of all types of workers from the bottom rung on the employment ladder to the top executive.

CONCLUSION

Accordingly, the decision of the Missouri Supreme Court should be reversed because the statutory gender-based classification death benefits under the Workmen's Compensation Law violates the Equal Protection clause of the U.S. Constitution and the case should be sent back to the Missouri Supreme Court for a decision on whether the remedy should be to invalidate the provision conclusively granting benefits to widows or to extend the conclusive presumption coverage to include both the widowers and widows under the Missouri Workmen's Compensation Death Benefits. *Orr* v. *Orr,* 99 S.Ct. 1102 (1979).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-381

PAUL J. WENGLER,
Appellant,

vs.

DRUGGISTS MUTUAL INSURANCE COMPANY, and
DISCUS PRESCRIPTION DRUGS, INC.,
Appellees.

On Appeal from the Supreme Court of Missouri

BRIEF OF APPELLEES

Druggists Mutual Insurance Company, and
Discus Prescription Drugs, Inc.

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II. The Missouri Supreme Court properly determined that Califano v. Goldfarb does not control here because Missouri Workmen's Compensation Law (1) was not intended to provide a system of blanket social insurance, as was the Social Security System; (2) did not unfairly tax Mrs. Wengler for benefits her spouse did not receive and (3) unlike the Social Security System, provided benefits for needy widowers 11

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IN THE

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OCTOBER TERM, 1979

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On Appeal from the Supreme Court of Missouri

BRIEF OF APPELLEES

Druggists Mutual Insurance Company, and
Discus Prescription Drugs, Inc.

SUMMARY OF THE ARGUMENT

I

The Missouri Supreme Court upheld the gender-based classification in Missouri's Workmen's Compensation Statute which affords a conclusive presumption of dependency to widows for obtaining death benefits because of the death of her spouse by accident, and not to widowers unless they are physically or mentally incapacitated because the Court found that Missouri's General Assembly assured benefits to widows in order to alleviate economic hardship confronting a woman, upon the death of her spouse, a hardship more pronounced for

women than for men. And the Missouri Court reasoned that assuring entitlement to widows substantially achieved the legislature's objective.

The Court believed that the legislature intended to favor married women, including wage earning married women, rather than discriminate against them. A woman's economic disadvantage is apparent when her earning capabilities are compared with a man's. For two decades, the median income of women has been approximately sixty percent of that earned by men.

The Missouri Court's decision followed and relied upon the decision of this Court in *Kahn* v. *Shevin,* 416 U.S. 351 (1974); *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975); and *Califano* v. *Webster,* 430 U.S. 313 (1977).

II.

The Missouri Court believed that the purpose and basis for the classification under Missouri's Workmen's Compensation Act differed from the purpose and basis of the classification under the Social Security System and for this reason the cases of *Califano* v. *Goldfarb,* 430 U.S. 199 (1977) and *Weinberger* v. *Wiesenfeld,* 420 U.S. 635 (1975) are distinguishable.

The Workmen's Compensation Act is not intended to be a system of blanket social insurance but is intended to compensate employees and their dependents for *economic loss* caused by an accident arising out of employment. The System does not tax female wage earners and yet deprive their dependents of benefits as did the Social Security System. The compensation benefits are financed solely by the employer, without contribution by the employee.

The female wage earner's dependent is given benefits when the dependent suffered actual economic loss because of his spouse's death. The law intended no more, especially at the expense of the employer. The Social Security Statute required a

husband to show that one-half of his support came from his wife. Thus, unless his wife had earned three times what he earned, a widower was not entitled to benefits under the Social Security Act.

III.

The classification which presumes that a widow is dependent upon her husband affords a widow both procedural and substantive advantages.

The legislature in its wisdom determined that children under the age of 18, wives, and husbands mentally or physically incapacitated, were those persons who should presumptively be dependent and therefore in "need of aid or support". In each of the classifications, children, widows and widowers, there will be those who are not actually dependent. However, the presumption does save the state the necessity of numerous determinations of dependency and it assures prompt payment of benefits to dependents of those killed in industry. Such imperfect classifications do not violate the Equal Protection Clause where the classification has a reasonable basis. *Weinberger* v. *Salfi,* 422 U.S. 749, 769 (1975); *Califano* v. *Boles,* 61 L.Ed.2d. 541, 555 (1977).

Substantively, the widow's award is worth more when she does not have to litigate the question of dependency. The presumption also assures benefits to a wage earning widow even though she is only partially dependent upon her husband, as where she earns as much as 38.8% of the family's income and would if not afforded the presumption be awarded only partial benefits.

The abstractions that the presumption of dependency is "freighted * * * with the baggage of sexual stereotypes", denies women independence and causes them to be "clouded and overshadowed" by men, or causes "invidious discrimination" state only broad generalities and absolutisms. Such statements con-

demn legislation which in reality serves the needs of women today, without providing any assurance that upon invalidation of the statute, the System will adequately provide for widows. The position which suggests that the married woman (widow), including married women wage earners, can and should shift for themselves is impersonal, impractical and detached from the real world and how men and women are treated in the job market.

The Missouri legislature struck a delicate economic balance in deciding the amount of compensation it would require employers to pay upon injury or death of employees. Widowers are not deprived of benefits upon proof of dependency. The Missouri Court believed that the substantial difference in economic standing of working men and women justifies the advantage that Section 287.240(4)(a) gives to widows. This Court should adopt the Missouri Supreme Court's position and give the same deference to the Missouri Statute.

ARGUMENT

I. The Missouri Supreme Court Properly Found That The Classification In The Missouri Workmen's Compensation Statute, Section 287.240 (4)(a) R.S.Mo., 1976 Supplement, Which Conclusively Presumes That Widows Are Entitled To Benefits But Which Does Not Afford The Same Presumption To Widowers Unless They Are Physically Or Mentally Incapacitated Does Not Violate The Equal Protection Clause Of The Fourteenth Amendment To The Constitution Of The United States For The Classification Serves The Important Governmental Objective Of Cushioning The Financial Impact Of Spousal Loss For Widows, The Sex For Whom That Loss Imposes The More Serious Burden.

The Missouri Supreme Court determined that the gender-based classification of Missouri's Workmen's Compensation Statute which affords a conclusive presumption of dependency to a widow for obtaining workmen's compensation benefits for the death of her spouse but requires a widower to prove actual dependency (unless he is mentally or physically incapacitated) does not violate the Equal Protection Clause of the United States and Missouri Constitutions because assured payments of death benefits to a widow serves an important governmental objective and substantially achieves the objective. The conclusive presumption alleviates the economic hardship confonting a widow resulting from the death of her spouse. The Supreme Court of Missouri found that the economic hardship a woman suffers upon that event is more immediate and pronounced than that suffered by a man (Jurisdictional Appendix A-10, A-11). Further, the Missouri Court found that this hardship was real and supported by empirical data. *Kahn* v. *Shevin*,416 U.S. 351, 354, 355 (1974); Juris App., A-4, A-11. See Bureau of Labor Statistics, U.S. Department of Labor, U.S. Working Women: A Databook, Bulletin 1977, Tables 35-39, 41 (1977).[1]

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[1]These tables are reproduced in the Appendum, pp. A-1 to A-7.

The Supreme Court of Missouri concluded:

> The widower is not deprived of death benefits upon the compensable death of his wife but is entitled to same upon proof of dependency. In our opinion, the substantive difference in the economic standing of working men and women justifies the advantage that Section 287.240 (4)(a) administratively gives to a widow." [Juris. App. A-11]

In reaching this result, the Missouri Court followed the decision of this Court in *Kahn* v. *Shevin,* supra; *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975) and *Califano* v. *Webster,* 430 U.S. 313 (1977) which decisions uphold the validity of legislation that treats men and women differently when the classification by gender served important governmental objectives and was substantially related to the achievement of those objectives. In *Kahn* v. *Shevin,* supra, the Florida Statute granted a tax exemption to widows and not to widowers for the reason that the differing treatment of widows was intended to further the state policy of cushioning the financial impact of spousal loss upon the sex for which the loss imposes the heaviest burden. 416 U.S. at 353.

The brief of Amicus Curiae, p. 40, attempts to distinguish *Kahn* v. *Shevin* on the basis that the exemption did not discriminate against the woman wage earner as the workmen's compensation classification does. However, this distinction is not valid. The exemption does discriminate against all wives, including wage earning wives, who predecease their husband, for the wife's estate after it passes to her widower, is of less value to her widower since it is not entitled to the annual tax exemption, than is the estate of a man who predeceases his spouse who may claim the property tax exemption. This Court upheld the discriminatory effect of the statute as not violative of the equal protection clause, even though it granted the exemption to independently wealthy widows who were not in need of a tax

break and although it denied the exemption to widowers who were needy. [Missouri's Workmen's Compensation Statute works with an even hand and grants benefits to those men (widowers) who are actually in need of support.]

In *Califano* v. *Webster,* 430 U.S. 313 (1977), this Court held that the provisions of Section 215 of the Social Security Act (42 U.S.C.S. § 4015), which permitted old age insurance benefits obtained by women reaching the age of 62 before 1975 to be greater than those obtained by men of the same age with the same earning record, did not violate the equal protection clause of the Fifth Amendment, since the more favorable treatment of female wage earners served the purpose of compensating women for past economic disabilities suffered by them.

Similarly, the different treatment of the sexes, under 10 U.S.C.S. § 6401(a), which required mandatory discharge of a woman line officer for want of promotion after thirteen years of commissioned service, discriminated against male officers who under 10 U.S.C.S., § 6382(a), were mandatorily discharged if passed over for a promotion two consecutive times. This Court held that the Fifth Amendment Equal Protection Clause was not offended, since the classification rationally compensated women line officers who had less opportunity for promotion than male officers. This Court reasoned that permitting longer periods of tenure for women officers was consistent with providing women with a fair and equal advancement program. *Schlesinger* v. *Ballard,* 419 U.S. 498, 508 (1975).

The decision of the Missouri Court in the present case was not in opposition to the decisions of this Court but in fact acknowledged and followed them. In reaching this result, the Missouri Court applied the "substantial relationship test", the test used by this Court in *Califano* v. *Webster,* supra, 430 U.S. at 316, 317; *Orr* v. *Orr,* 440 U.S. 268, 59 L.Ed.2d 306, 319 (1979) and *Califano* v. *Westcott,* 61 L.Ed.2d 382, 393 (1979).

In basing its decision upon the consideration that the Missouri Legislature, when it enacted the statute creating the presumption in favor of widows, intended to favor women rather than discriminate against them, the Missouri Supreme Court noted that the data available to the General Assembly of Missouri at the time the legislation was enacted supported the concept that a widow was more in need of total benefits upon her husband's death without drawn-out proceedings to determine the amount of benefits than was a man. It was also clear to the Court that a woman's needs continue to the present. (Juris. App., A-10).

The statistics available to the Missouri Court and to this Court, include not only those cited in *Kahn* v. *Shevin,* supra, 416 U.S. at 354, 355, but those available in more recent Department of Labor publications. And those statistics show that it is the married female wage earner, who appellant claims is most sorely disadvantaged by the presumption, who also suffers the economic hardship when her husband dies. In 1976, the median personal income for married women whose husbands were present in the home was $3800.00. The median income of husband-wife families was $16,200.00 and *rose* to $18,700.00 when the wife was in the labor force. Bureau of Labor Statistics, U.S. Department of Labor, Employment in Perspective: Working Women, Report 547 (Third Quarter 1978). In 1975, in families where the wife was employed, the median percent of family income accounted for by the earnings of the wife was 26.3%. In instances where the wife worked on a fulltime basis, the median percent of family income accounted for by her earnings was 38.8%. In instances where the wife worked on a part-time basis or fulltime for one to 26 weeks a year, the median percent of family income accounted for by her earnings was 11.8%. U. S. Working Women, supra, Table 41. See also, Bureau of Labor Statistics, U. S. Department of Labor, Marital and Family Characteristics of Workers, March 1977, Labor Force Report 216, Table 3, 4 p. 53; Supplementary Table D, p. A-15, Table N, pp. A-42, 43.

The statistics also show that married women earn less than their never married sisters. The reason for this may be that married women have had part of their working lives interrupted by marriage and child bearing and that married women are in fact helping their husbands earn his wages, which in turn tend to be greater than those earned by never married men and women. Sowell, Status Versus Behavior, 1979 Wash. U.L.Q. 179, 184, 185.

In 1976, of the 1,846,000 women in Missouri, 831,000 or 48.7% were employed in either a fulltime or part-time basis, and correspondingly, 51.7% were not employed. Of the 1,632,000 men in Missouri, 1,228,000 or 75.3% were employed. Statistically then more men are actively engaged in gainful employment than women, and are therefore less likely to suffer the impact of lost wages caused by the death of their spouse. In addition, the disparity between men and women is reflected by the higher unemployment rate among women. In 1976, the rate of unemployment for women in Missouri was 7.4% and for men 5.4%. Bureau of Labor Statistics, U.S. Department of Labor, Geographical Profile of Employment and Unemployment, Report 504, Table 3 (1977). And traditionally, Missouri's women are employed in those occupations which pay lower salaries. For instance, 57.8% of women employed in Missouri were either clerical workers or service workers. Only 4.5% were managers, or administrators. 14.2% of men employed worked as clerical workers or service workers, and 12.7% were administrators or managers. Thirty six percent worked at crafts or kindred occupations or were operatives, transportation or otherwise. Geographical Profile, *supra,* Table 6. In May, 1976, the median usual weekly earnings for women in the U.S. generally, employed as clerical workers, was $147.00, for men $228.00. The median usual weekly earnings for women employed as service workers was $109.00 and for men $170.00. So that even in the occupations where women are most numerous, their earnings are 64% as much as men's earnings in

the same occupation. The median weekly income for male operators was $202.00, for females $121.00. The weekly earnings of women administrators and managers was $187.00, while men averaged $320.00 per week. U.S. Working Women, *supra,* Table 36. More generally, the median annual earnings of year-round fulltime female workers in 1975, was $7,504.00 and that of men was $12,631.00. U.S. Working Women, *supra,* Table 39.

In a more recent publication, the Bureau of Labor Statistics noted:

> In 1977, women who worked year round, full time (50 to 52 weeks, 35 hours or more per week) earned, on average, about 60 cents for every dollar earned by their male counterparts. Women's median earnings were $8,6000 compared to $14,600 for men.
>
> For more than 2 decades, the earnings differential between working men and women has stayed in the narrow 58 to 63 percent range despite the enormous influx of women into the labor force. During the last 25 years, the proportion of women in the population who work has risen from 34 to 50 percent, and now more than 4 of every 10 workers are women. One reason that no real change has occurred in the earnings gap is that a substantial proportion of women are still concentrated in the traditional, low-paying female jobs—about 6 out of 10 women are employed in clerical, service, and retail sales jobs. Another reason is that a large number of women now entering the work force are employed at low-paying entry-level jobs, and temporarily, their earnings may be holding down the average earnings of all women.
>
> Bureau of Labor Statistics, Department of Labor, Employment in Perspective: Working Women, Report 547, (Third Quarter 1978).

II. The Missouri Supreme Court Properly Determined That Califano v. Goldfarb Does Not Control Here Because Missouri's Workmen's Compensation Law (1) Was Not Intended to Provide a System of Blanket Social Insurance, As Was the Social Security System; (2) Did Not Unfairly Tax Mrs. Wengler for Benefits Her Spouse Did Not Receive and (3) Unlike the Social Security System, Provided Benefits For Needy Widowers.

The Missouri Supreme Court distinguished this case from the case of *Califano* v. *Goldfarb,* 430 U.S. 199 (1977) because the circumstances of this case materially differed from the gender-based distinction created by the Social Security Act. The Social Security Act allowed a widow to receive benefits based upon earnings of her deceased husband without showing actual dependency but required a widower to prove he was receiving at least one-half of his support from his deceased wife to qualify for benefits upon her death.

First the Missouri Supreme Court noted that the death benefits provided for by Missouri's Workmen's Compensation Statute was not intended to provide blanket survivorship benefits. The Workmen's Compensation Statute was not deemed to be a system of social insurance as was the Social Security System. Juris. Appendix A-8, A-9; *Weinberger* v. *Wiesenfeld,* 420 U.S. 635, 644 (1975). Workmen's compensation benefits are substitutional to the common law rights and remedies in favor of the injured employee for his or her dependents for accident which results in the course of employment. Juris. Appendix A-3, A-9; *Todd* v. *Goostree,* 493 S.W.2d 44 (Mo. App. 1973). The Compensation Act is designed to compensate only for *economic loss* to the worker or his dependents suffered because of lost wages due to disability or death and is not designed to compensate for pain and suffering alone or for loss of spousal services or consortium. Blair, *Reference Guide to Workmen's Compensation Law,* §11.01.

Based upon this understanding of Missouri's Workmen's Compensation Law, appellant Wengler's position is untenable. He cannot claim that he was denied a benefit which was his due.[2] He has not suffered any economic loss as the Workmen's Compensation Act views loss, because his wife had never contributed any of her earnings to his support. (Division Workmen's Compensation Commission, Tr. 3).

The Missouri Court also believed that the Social Security System was different from Missouri's Workmen's Compensation Laws in that the Social Security System was generally based upon mandatory contributions from past wage earnings of the employee. (Juris. App. A-8, A-9). The Workmen's Compensation Statute prohibits employee contributions to the System. Section 287.290, Mo. R.S. The employer is solely responsible for financing the System. Section 287.280-.300. In *Califano* v. *Goldfarb,* Mrs. Goldfarb had directly contributed her wages to finance the Social Security System and her husband was entitled

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[2]At pages 27-29 of their Brief, Amicus Curiae compare the Workmen's Compensation "substitutional" remedy in case of death with the rights created by Missouri's Wrongful Death Act. Mo. Stat. Ann. §537.090 (1977 Supplement). The Workmen's Compensation remedy limits damages paid by the employer in the case of death to recovery of funeral expenses, §287.240(1) and to payment to the dependent of the employee of death benefits based upon a percentage of the employee's average weekly earnings. Mo. Stat. Ann. §287.240(2). The death statute permits recovery for "pecuniary loss" which includes services the deceased would have rendered his surviving spouse. The Workmen's Compensation Act provided for compensation for accidents whether or not the employer was at fault in exchange for reduced measure of damages. Missouri's Workmen's Compensation Act affords Wengler no compensation because he suffered no economic loss, not because the Act discriminates against him because of his sex. The statement made by amicus curiae at page 29 of their brief that "Missouri Compensation substitute is in fact no substitute at all when a Ruth Wengler dies" is true. However, the inference drawn is incorrect. It is no "substitute" because the Act does not provide for compensation where there is no economic loss, not because the Act discriminates unconstitutionally.

to recover nothing. 430 U.S. at 206, 207. Mrs Wiesenfeld had also contributed wages. *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 645. This Court was understandably indignant when the System precluded protection for the wage earner's spouse but also deprived the wage earner of a portion of her earnings in order to contribute to a fund out of which similar benefits were paid to others. In the present case, Mrs. Wengler paid none of her wages into the System. There can be no outcry that she was "unfairly" discriminated against for this reason.

The statement in Amicus Curiae's Brief, p. 31, that the Missouri Supreme Court thought it proper to disregard the rights of a female worker when she did not contribute to the plan is inaccurate. The Supreme Court of Missouri made no reference to whether or not it believed that workmen's compensation benefits were a part of an employee's total compensation package. The Court noted that the employee contribution element, present and relied upon in *Goldfarb* and *Weinberger,* was not a consideration in Wengler's case. Furthermore, since the legislative intent was to compensate workers for economic loss suffered by their dependents, Mrs. Wengler received for her dependent the degree of protection which the Missouri Legislature intended to extend to all workers. In any event, even if this Court concludes that the Statute discriminates against female wage earners because their fringe benefits are less than those afforded male wage earners, the classification is permissible since the statutory classification which treats men and women differently serves the important governmental objective of cushioning a male worker's dependent from spousal loss which is more immediate and pronounced than that suffered by a female worker's dependent and because the classification is substantially related to the achievement of that objective. *Califano* v. *Webster, supra.*

There is an additional difference between the statutory classification under §287.240(4) and the classifications contained in the Social Security Act. Under the Social Security Act,

Mr. Goldfarb had to show that he had received one-half of his support from his wife at the time of her death. Under Missouri's Workmen's Compensation Act, a widower who in fact suffers loss of support because of his wife's death due to a job-related injury, is entitled to compensation. Section 287.240(2) and (3) Mo. R.S.; *Gantner* v. *Fayette Brick & Tile Co.*, 236 S.W.2d 415 (Mo. App. 1951); *Dykes* v. *Thornton*, 282 S.W.2d 451 (Mo. 1955); 302 S.W.2d 304 (Mo. 1957).[3]

The remaining cases cited by appellant's brief, p. 13, *Reed* v. *Reed*, 404 U.S. 71 (1971); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); and *Califano* v. *Westcott, supra*, in support of his contention that the widows presumption of dependency denies him the equal protection of the law are distinguishable from this case for the discriminatory treatment in each of those cases did not in any way compensate a female for past disparate economic treatment nor did the objective asserted meet the "substantial relationship test". In *Frontiero, supra*, the Court held invalid an act of Congress relating to military pay which allowed a male member of the military service to claim his wife as a dependent without any showing of such a fact, but which required a female member to show that her husband was dependent upon her for more than one-half of his support before she could claim benefits. The consequences of spousal dependency were in-

[3]The brief of Amicus Curiae, p. 15, states that the husband will go remediless so long as he has the means to support himself. It is true that a "dependent" who is physically capable of supporting himself or herself but makes no effort to do so but just relies upon the employee for support and lives in idleness is not entitled to death benefits even though he or she may been supported in fact by the employee. *Ricks* v. *H.K. Porter Inc.*, 439 S.W.2d 164 (Mo. 1969). However, when the employee pools his funds with other members of a household or pays a part of his salary for their support, those relying upon these contributions may be a total or partial dependent. See *Faccone* v. *Busy Bee Candy Co.*, 216 S.W.2d 112 (Mo. App. 1948); *Gantner* v. *Fayette Brick & Tile Co., supra*. Thus the needy widower who was supported in part or in whole by his wife is entitled to benefits.

creased fringe benefits in the form of quarters allowance and medical and dental benefits. In the *Frontiero* case, the disparate treatment between male and female personnel in no way compensated a female for past disparate economic treatment. Additionally, the government in *Frontiero* conceded that the sole purpose of the differential treatment was administrative convenience, and that it saved the government money not to have to determine whether males' spouses were dependent. 411 U.S. at 688-9. This Court consequently held that achieving administrative convenience was not based on a fair and substantial relationship to the object of a legislation, i.e. to provide fringe benefits to members of the uniform services in order to establish a compensation pattern which would attract career personnel through re-enlistment. 411 U.S. at 690, n. 25. This Court stated, 411 U.S. 690:

> We therefore conclude that, by according differential treatment to male and not female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband.

The same analysis can be applied to *Califano* v. *Westcott*, 61 L.Ed.2d 382, 99 S.Ct. 2655 (1979). In *Westcott*, the statute provided benefits to families whose dependent children had been deprived of parental support because of the father's unemployment, but did not provide such benefits when the mother was unemployed. The statute tended to perpetuate economic disadvantage to women, and did not compensate them for the disparity between the economic capabilities of a man or a woman. In *Reed* v. *Reed, supra*, the Idaho statute which gave preference to males as administrators of decedents' estates in no way compensated or benefited women for past or present economic disparate treatment.

In *Orr* v. *Orr*, 440 U.S. 268, Alabama's statute which provided that husbands and not wives may be required to pay alimony upon divorce discriminated against those males who because of their financial circumstances were in need of support. Missouri's Workmen's Compensation Law compensates all widowers who are mentally and physically incapacitated from earning a living, and those who can actually show that they were dependent in part or in whole upon their wife for support. Entitlement is not denied needy males under the Missouri law while it was denied needy males under the Alabama statute.

III. The Procedural and Substantive Advantage Afforded Widows by Missouri's Workmen's Compensation Act, Assuring Widows, Including Those Earning Wages, of Full Benefits, Serves the Needs of Women Today Without Perpetuating Disadvantage to Them and Also Fosters the State's Concern for Avoiding the Expense and Burden of Litigating the Question of Dependency in Each Case Involving Widows.

The Missouri legislature was faced with the problem in distributing benefits to those who actually suffered economic loss, of defining the classes of persons who would be entitled to receive benefits. When it selected minor children under the age of 18, Section 287.240(4)(b) R.S.Mo., 1976 Supplement, wives, and husbands mentally and physically incapacitated, as those persons who would be presumptively dependent and therefore in "need of aid or support", it included in such classifications children, widows and physically and mentally incapacitated widowers, who were not in fact dependent upon the wage earner. These classes do not perfectly reflect actuality of dependence but it does save the state the necessity of numerous determinations of dependency and it assures prompt payment of benefits to dependents of those killed in industry. See Cohn, R. Robert, History of Workmen's Compensation Law, 15 Vernons Annotated Statute 17, 24.

A state does not violate the Equal Protection Clause simply because the classification made by its laws are imperfect. If the classification has a reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or results in some inequality. (Juris. App. A-6, A-7; *Weinberger* v. *Salfi*, 422 U.S. 749, 769; *Califano* v. *Boles*, 61 L.Ed.2d 541, 555 (1979).

The benefits afforded widows under the Act are substantive as well as procedural. A widow's award is worth more to her when she does not have to litigate the question of dependency. Schweitzer, Preparation Manual for Accident Cases, pp. 64, 5, (1935). Further, the Act assures benefits to a widow even though she is only partially dependent upon her husband. Full benefits are assured to widow wage earners who earn as much as 38.8% of the family's income, the median for married women employed fulltime[4] who otherwise might have been entitled only to partial benefits. See *Gantner* v. *Fayette Brick & Tile Co.*, *supra.*

Should this Court conclude that §287.240(4)(a) unconstitutionally discriminates against widowers and/or female wage earners, and remand this case to the Supreme Court of Missouri for disposition, then it appears certain that the Supreme Court of Missouri will invalidate the statute, as the California court did in *Arp* v. *Workers' Compensation Appeals Board*, 19 Cal. 3d 395, 563 P.2d 849, (1977), rather than extend its benefits to widowers.[5] The Missouri Court in choosing between the alter-

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[4]See U.S. Working Women, Table 41.

[5] Amicus Curiae infers that Missouri's Supreme Court may extend benefits to widowers because death benefits are a relatively insignificant cost in comparison with the total amount paid in compensation benefits. Brief, Amicus Curiae, p. 53, n. 39. The amounts are not insignificant to Missouri employers who are the sole financiers of the plan. The total amount paid in death benefits for a stated year must be revised annually to reflect the true amounts paid to date in death benefits for that year. The $119,844.71 which amicus curiae indicates

native of extension or invalidation must "accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole". *Califano* v. *Westcott, supra,* 61 L.Ed.2d at 396 (concur in part, dissent in part); *Welsh* v. *United States,* 398 U.S. 333, 365-366 (1970). The Missouri Court has already indicated that it believes that the purpose of the Workmen's Compensation Act was not to provide blanket "social insurance". The basis for recover is economic loss.[6] (Juris. Appe., A-9)

In the event of invalidation, widows who earned 38% of the family income may well be entitled to only partial payments and this after extended litigation over the amount of support her husband contributed to her during his lifetime. Her burden will be to show by substantial evidence that she was dependent. *Dykes* v. *Thornton, supra.*[7]

Amicus Curiae assert that the presumption of dependency is "freighted * * * with the baggage of sexual stereotypes," (Brief, Amicus Curiae, pp. 10, 13), and denies women independence and causes them to be "clouded and overshadowed" by men. (Brief, Amicus Curiae, p. 14) Judge

was paid in death benefits in 1974 was just the tip of the iceberg. The 1978 revised figures for 1974 indicate that there were 150 compensated deaths in Missouri; benefits paid out through July 1978 for the 150 deaths attributable to accidents which occurred in 1974 amounted to $703,901.99, while $34,137,456.94 total compensation were paid for 1974. As of July 1978, statistics show that there were 148 deaths from accidents which occurred in 1976, and $801,163.24 paid out in benefits, while $46,020,248.17 in total benefits were paid for that year. Missouri Department of Labor and Industrial Relations, Annual Report, Fiscal Year 1978, pp. 22, 23. Undoubtedly, these figures and the figures shown for 1977 will be adjusted upwards again as employers continue to pay weekly death benefits to already determined claims, and as injuries occurring in one year results in death in later years.

[6]See page 12 for discussion of the rationale upon which payments are made.

[7]Amicus Curiae, Brief pp. 15-17, believes that the burden placed on widowers to show dependency is stringent.

Bardgett in his opinion, (Juris. Appl., p. A-9) noted that whenever statutes are declared unconstitutional they are accused of causing "invidious discrimination" or of being "archaic and overbroad generalizations which have little relationship to present reality". These very abstractions and broad generalities condemn legislation which in reality serve the needs of women today as much as it did in 1927 when this legislation was passed. Freund notes that the twin vices of abstractness and absolutism can make our thinking unresponsive to reality. Freund, The Philosophy of Equality, 1979 Wash. U.L.Q. 11, 21. The Court should not allow broad claims of "sexual stereotyping" to cause it to lose sight of the fact that women economically are not the equal of men. The statistics overwhelmingly support the notion, that except for the fortunate few, women still suffer disproportionately for spousal loss. Appellants have made no showing that those women who are protected by the conclusive presumption do not need the protection and that they will not be placed in serious economic difficulty by invalidation of the statute.

As the Supreme Court of Missouri noted "the legislature must strike a delicate economic balance in deciding the amount of compensation it will require employers to pay upon injury to or death of employees." Jurisdictional Statement, A-11. In Missouri, the widower is not deprived of benefits upon proof of dependency. The Missouri Court believed the substantial difference in economic standing of working men and women justifies the advantage that §287.340(4)(a) gives to widows.

This Court has traditionally reasoned that it will not substitute its social and economic belief for the judgment of the legislative body. *Kahn* v. *Shevin,* supra, 416 U.S. 356, n. 9, citing *Ferguson* v. *Skrupa,* 372 U.S. 726, 730 (1963). Appellee respectfully requests that the Court give the same deference to §287.240(4)(a) and to the General Assembly of the State of Missouri.

CONCLUSION

The Supreme Court of Missouri properly found that the classification created by Section 287.240(4)(a) of Missouri's Workmen's Compensation Statute is not violative of the equal protection clause of the United States Constitution. The classification created by the statute which treats men differently in assuring death benefits to widows and not to widowers, is based upon the fair and substantial relationship to the legislative objective of assuring death benefits to widows, the sex for whom the loss of spousal earnings historically and to the present day has had the most disproportionate burden because of prior overt economic discrimination by a male dominated culture.

In Missouri, the widower is not deprived of death benefits but is entitled to benefits upon proof of dependency.

For the reasons stated above, the decision of the Missouri Supreme Court should be affirmed.

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APPENDUM

APPENDUM A

Bureau of Labor Statistics, U. S. Department of Labor, U. S. Working Women: A Databook, Bulletin 1977, (1977)

Table 35

Median usual weekly earnings of full-time wage and salary workers by sex, 1967-76

Year	Usual weekly earnings				Women's earnings as percent of men's
	In current dollars		In 1967 dollars		
	Women	Men	Women	Men	
May of:					
1967.....	$ 78	$125	$78	$125	62
1969.....	86	142	79	130	61
1970.....	94	151	81	131	62
1971.....	100	162	83	134	62
1972.....	106	168	85	135	63
1973.....	116	188	88	143	62
1974.....	124	204	85	140	61
1975.....	137	221	86	138	62
1976.....	145	234	86	138	62

Table 36
Median usual weekly earnings of full-time wage and salary workers by sex and occupation and industry group, May 1976

Occupation and industry group	Usual weekly earnings: Women	Men	Women's earnings as percent of men's
OCCUPATION			
Professional-technical ...	$218	$299	73
Managerial-administrative, except farm	187	320	58
Sales	111	244	45
Clerical	147	228	64
Craft	149	243	61
Operatives, except transport	121	202	60
Transport equipment operatives	(1)	216	—
Nonfarm laborers	121	166	73
Service.....	109	170	64
Farm	107	122	88
INDUSTRY			
Agriculture.....	$113	$129	88
Construction	167	244	68
Mining	(1)	280	—
Manufacturing.....	137	231	59
Durable goods	148	235	63
Nondurable goods...	127	222	57
Transportation and public utilities	190	270	70
Wholesale trade	148	240	62
Retail trade.....	113	188	60
Finance, insurance, and real estate	144	270	53
Private houshold	66	(1)	—
Miscellaneous services ...	160	224	71
Public administration	173	269	64

[1] Median not shown where base is less than 75,000.

Table 37

Median annual earnings of year-round full-time workers 14 years and over by sex, 1955-75

Year	Annual earnings: Women	Men	Women's earnings as percent of men's
1955	$2,719	$ 4,252	63.9
1956	2,827	4,466	63.3
1957	3,008	4,713	63.8
1958	3,102	4,927	63.0
1959	3,193	5,209	61.3
1960	3,293	5,417	60.8
1961	3,351	5,644	59.4
1962	3,446	5,794	59.5
1963	3,561	5,978	59.6
1964	3,690	6,195	59.6
1965	3,823	6,375	60.0
1966	3,973	6,848	58.0
1967	4,150	7,182	57.8
1968	4,457	7,664	58.2
1969	4,977	8,227	60.5
1970	5,323	8,966	59.4
1971	5,593	9,399	59.5
1972	5,903	10,202	57.9
1973	6,335	11,186	56.6
1974	6,970	11,889	58.6
1975	7,504	12,758	58.8

NOTE: Data for 1955 to 1966 are for wage and salary workers only and exclude self-employed persons.

Table 38

Median annual earnings of women 14 years and over by weeks worked, 1975

Work experience	Annual earnings	Women's earnings as percent of men's
Total who worked at any time in 1975	$3,953	40.9
Worked at full-time jobs	5,853	53.6
50 to 52 weeks	7,504	58.8
27 to 49 weeks	4,551	59.4
26 weeks or less	1,291	62.3
Worked at part-time jobs	1,274	105.6
50 to 52 weeks	2,799	114.2
27 to 49 weeks	1,867	93.1
26 weeks or less	628	94.9

Table 39

Median annual earnings of year-round full-time workers in 1975, by selected characteristics, March 1976

Item	Number employed year round, full time (thousands)		Annual earnings		Women's earnings as percent of men's
	Women	Men	Women	Men	
Total, 16 years and over	17,451	37,255	$ 7,504	$12,631	59.4
Never married	3,516	4,657	7,522	8,849	85.0
Married, spouse present	9,972	30,023	7,483	13,334	56.1
Married, spouse absent	861	808	6,733	10,468	64.3
Divorced	1,933	1,404	7,922	12,321	64.3
Widowed	1,168	363	7,397	11,577	63.9
White	15,097	33,939	7,514	12,884	58.3
Black	2,036	2,768	7,237	9,710	74.5
Spanish origin	629	1,511	6,431	9,413	68.3
Years of school completed:					
Less than 12	3,194	8,871	5,682	10,040	56.6
12 only	8,392	14,139	7,103	12,260	57.9
16 or more	3,041	8,167	10,519	17,129	61.4

Item	Number employed year round, full time (thousands)		Annual earnings		Women's earnings as percent of men's
	Women	Men	Women	Men	
Occupation:					
Professional and technical	3,321	6,417	10,524	15,968	65.9
Managers and administrators, except farm	1,424	6,478	9,125	15,903	57.4
Clerical	7,166	2,453	7,562	12,136	62.3
Operatives, except transport	1,940	3,796	6,241	10,953	57.0
Service, except private household	2,275	2,637	5,414	9,491	57.0
In metropolitan areas[1]:					
Central cities	5,841	10,088	7,845	12,435	63.1
White	4,435	8,202	7,880	12,886	61.2
Black	1,234	1,602	7,584	10,640	71.3
Spanish origin	353	760	6,116	9,395	65.1
Suburbs	6,977	15,744	8,019	14,199	56.5
White	6,409	14,979	8,002	14,357	55.7
Black	452	538	7,989	10,224	78.1
Spanish origin	216	506	7,051	10,052	70.1

[1] Standard Metropolitan Statistical Areas.

Table 41

Earnings of married women, husband present, as percent of family income in 1975, by selected characteristics of husband-wife families, March 1976

Characteristic	Number of wives (thousands)	Median percent of family income accounted for by earnings of wife
Total, wives with earnings	23,709	26.3
Age of husband:		
Under 25 years	2,259	30.7
25 to 44 years	11,554	25.3
45 years and over	9,906	26.5
Wife worked 50 to 52 weeks full time	9,871	38.8
Family income:		
Under $10,000	841	59.5
$10,000 to $14,999	1,777	44.7
$15,000 to 19,999	2,466	39.2
$20,000 to $24,999	2,078	36.9
$25,000 and over	2,709	33.1
Median family income	$19,699	—
Wife worked 27 to 49 weeks full time	3,116	30.7
Wife worked 1 to 26 weeks full time or 1 to 52 weeks part time	10,722	11.8

Supreme Court, U. S.
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No. 79-381

In the Supreme Court of the United States

OCTOBER TERM, 1979

PAUL J. WENGLER, APPELLANT

v.

DRUGGISTS MUTUAL INSURANCE CO., ET AL.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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ON APPEAL FROM THE SUPREME COURT OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether Missouri's workmen's compensation statute, which provides death benefits to a woman when her husband dies in a work-related accident, pursuant to a presumption of dependency, but conditions the payment of such benefits to a man on proof of dependency upon his wife's earnings, impermissibly discriminates on the basis of gender and therefore violates the Equal Protection Clause of the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

Congress has authorized the Attorney General to intervene on behalf of the United States in any action of general public importance involving allegations of denials of equal protection based on sex, as well as race, color or national origin. 42 U.S.C. 2000h-2. The United States also enforces civil rights statutes which prohibit discrimination based on sex. See 15 U.S.C. 1691e(g) (credit transactions); 20 U.S.C. 1682 (federally assisted educational programs); 20 U.S.C. 1706, 42 U.S.C. 2000c-6 (school admission); 42 U.S.C. 2000e-6 (employment); 42 U.S.C. 3613 (housing). The protection afforded employees by workmen's compensation is a benefit of employment. As a result, awards of workmen's compensation based upon sex may well constitute a violation of Title VII with respect to which the United States has enforcement responsibilities. See 42 U.S.C. 2000e-2(a)(2), and 29 C.F.R. 1604.9(a), (b), and (d).

This case presents an equal protection challenge to a state workmen's compensation statute that provides automatic death benefits to a surviving wife pursuant to a presumption of dependency but conditions the payment of benefits to a surviving husband upon a showing of dependency upon his wife's earnings or incapacity. In a divided decision, the Supreme Court of Missouri upheld the statute on the ground that it was intended "to satisfy a perceived need widows generally had, which need was not common to men whose wives might be killed while working" (J.S. App. A-10). In the court's view, the

economic hardship resulting from a working spouse's death was more immediate and pronounced on women than on men and the appellant had not presented any statistical evidence to the contrary.

In recent years, this Court has struck down similar gender-based classifications in federal statutes. See, *e.g.*, *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Califano* v. *Goldfarb*, 430 U.S. 199 (1977). These decisions prompted Congress in December 1977 to direct the Secretary of Health, Education, and Welfare and the Task Force on Sex Discrimination of the Department of Justice to identify those provisions in the Social Security Act which award benefits on the basis of presumptions of dependency and to propose the means for their elimination. See Pub. L. No. 95-216, Section 341, 91 Stat. 1548. In February 1979, the report was transmitted to Congress. It suggests the method by which the few remaining gender-based classifications in the Social Security Act may be removed. Moreover, Congress has recently equalized the benefits paid under federal workers' compensation-type statutes to surviving husbands and wives of federal employees. See, *e.g.*, Pub. L. No. 93-416, Section 6, 88 Stat. 1145, amendments to Federal Employees' Compensation Act, 5 U.S.C. 8110; Pub. L. No. 92-576, Section 20(c)(1), 86 Stat. 1265, amendments to Longshoremen's and Harbor Workers Compensation Act, 33 U.S.C. 902. Given the prohibition of the civil rights statutes against gender-based discrimination in employee compensation, the

United States has a direct interest in insuring that state statutes rest upon comparable standards of equality between men and women.

STATEMENT

1. The facts are fully stipulated and may be summarized as follows: On February 11, 1977, appellant's wife, Ruth Mae Wengler, was killed in a work-related automobile accident in the parking lot of her employer, appellee Dicus Prescription Drugs, Inc. At the time of her death, Ruth Mae Wengler's wages were $69 per week. Appellant was not dependent for his support on his wife's earnings during her lifetime and was not physically or mentally incapacitated from earning income (J.S. App. A-1, A-22 to A-23).

Appellant filed a claim for death benefits under Missouri's Workmen's Compensation Law, Section 287.240 (Mo. Ann. Stat. § 287.240 (Vernon 1979 Cum. Supp.)). The rate of compensation at which such benefits were payable was $46 per week (J.S. App. A-23). Under the Missouri Workmen's Compensation Law, a widower is not entitled to death benefits unless he (1) is mentally or physically incapacitated from wage earning; or (2) proves actual dependency upon his wife's earnings. On the other hand, a widow qualifies for death benefits without having to prove actual dependency on her husband's earnings (J.S. App. A-1 to A-2).

After a hearing on July 21, 1977, before a referee of the Missouri Labor and Industrial Relations Committee, the referee denied appellant's claim on the ground that he did not meet the statutory requirements of incapacity or dependency. On review, the Missouri Labor and Industrial Relations Commission adopted the referee's decision denying compensation (J.S. 4-5). Both the referee and the Industrial Commission rejected appellant's claim that the disparate treatment of widows and widowers violated the Equal Protection Clause of the Fourteenth Amendment. In their view, only a court had the authority to hold a statute unconstitutional (J.S. App. A-24).

The Circuit Court of Missouri reversed (J.S. App. A-21 to A-25). It held that the provision of the Missouri Workmen's Compensation Law that restricts the payment of death benefits to only those surviving husbands who are incapacitated or dependent upon their wife's earnings violates the Equal Protection Clause of the Fourteenth Amendment because the restriction does not apply to surviving wives (J.S. App. A-25).

2. In a 6-1 decision, the Supreme Court of Missouri reversed and upheld the constitutionality of the statute. The court acknowledged that to withstand scrutiny under the Equal Protection Clause, "classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives" (J.S. App. A-4). It concluded that the Missouri statute met this standard because the purpose of the conclusive presumption of dependency in favor of widows "was to satisfy a perceived need widows generally had, which need was not common to men whose wives might be killed while working" (J.S. App. A-10). As the court saw the

matter, "the substantive difference in the economic standing of working men and women justifies the advantage that [the Missouri statute] administratively gives to a widow" (J.S. App. A-11).

In the court's view, it seemed reasonably certain that the data available to the Missouri legislature at the time the statute was first enacted in 1925 would have "supported the concept that a widow was more in need of prompt payment of death benefits upon her husband's death without drawn-out proceedings to determine the amount of dependency than was a widower" (J.S. App. A-10). In this respect, the court analogized the statutory presumption of dependency favoring widows to the $500 real estate tax exemption for widows upheld in *Kahn* v. *Shevin*, 416 U.S. 351 (1974).

The decision below distinguished *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), and *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), in which this Court struck down gender-based presumptions of dependency in favor of women under the Social Security Act. The court did not regard those cases as controlling because the Social Security program is a form of social insurance funded by mandatory employee contributions while Missouri workmen's compensation law is a substitute for common law tort remedies and is funded solely by employers (J.S. App. A-9).

The dissenting judge expressed the view that *Weinberger* v. *Wiesenfeld*, *supra*, was controlling and compelled the conclusion that the statute violated the Equal Protection Clause. He concluded that the

gender-based distinction in the Missouri statute was premised on the " 'archaic and overbroad' generalization, * * * 'not * * * tolerated under the Constitution' * * *, namely, that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support" (420 U.S. at 643, quoting from *Schlesinger* v. *Ballard*, 419 U.S. 498, 507, 508 (1975)).

SUMMARY OF ARGUMENT

1. Under Missouri's workmen's compensation statute, the wife of an employed husband is conclusively presumed to be wholly dependent for support on the husband, and receives a full death benefit when the husband is killed in a work-related accident. However, the husband of an employed wife is accorded no such presumption, and receives benefits for the death of the wife only when, and to the extent that, he can prove he was actually dependent on her income. The Supreme Court of Missouri upheld this disparate dependency test as a means of redressing the legacy of economic discrimination against women and as an administratively convenient method of insuring that deserving women receive benefits. But the gender-based discrimination of the statute does not advance either goal and therefore violates the Equal Protection Clause.

This Court's decisions in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), and *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), control this case and require reversal of the decision below. There, the Court pointed

out that statutory presumptions that wives are dependent upon their husbands are not actually designed to remedy the effects of sex discrimination but are based on the outmoded assumption that wives remain at home and do not participate in employment of any significance. Although remedying the effects of discrimination against women may be a valid basis for properly drawn gender-based legislation, a conclusive presumption that wives are totally dependent on their husbands for support does not withstand constitutional challenge.

This Court's decisions also reject the Missouri Supreme Court's justification of the presumption as an administrative convenience. According differential treatment to men and women for the sole purpose of achieving administrative convenience is to make the arbitrary legislative choice forbidden by the Constitution.

Finally, Missouri's disparate treatment of the sexes is an exception to the current trend in this country. Forty-three of the 50 states treat men and women equally for purposes of determining dependency under workmen's compensation (see Appendix, *infra*). In three of these states, recent decisions have held unconstitutional statutes with a presumption of dependency identical to that at issue in this case. See *Arp* v. *Workers' Compensation Appeals Board*, 19 Cal.3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977); *Passante* v. *Walden Printing Co.*, 53 A.D.2d 8, 385 N.Y.S.2d 178 (1976); *Tomarchio* v. *Township of Greenwich*, 75 N.J. 62, 379 A.2d 848 (1977). And, as we have noted (*supra*, page 3), the federal workers' compensation statutes have recently been amended to treat spouses equally.

2. There are two equally constitutional remedies that would cure the defect of the Missouri statute. The presumption of dependency could either be extended to widowers or eliminated for widows. Since the provision at issue is a state statute, the decision on whether to extend the presumption to widowers or eliminate it for widows is one which is more appropriately made by the Supreme Court of Missouri. We therefore suggest that this Court hold the presumption unconstitutional and remand the case to the Supreme Court of Missouri to choose the remedy most closely in accord with the intent of the legislature.

ARGUMENT

I. THE MISSOURI WORKMEN'S COMPENSATION STATUTE IMPERMISSIBLY DISCRIMINATES ON THE BASIS OF GENDER AND THEREBY VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. The statutory presumption that wives are dependent upon their husband's earnings unconstitutionally discriminates against both widowers and working women

1. Appellant's wife was killed in a work-related accident. It is stipulated that he was not dependent upon her earnings for support. Under the Missouri Workmen's Compensation Law (Mo. Ann. Stat. § 287.240 (Vernon 1979 Cum. Supp.)), appellant was ineligible to receive any death benefits from his wife's employer following her work-related death.

But if the sexes of the *dramatis personae* had been reversed and appellant were a woman whose husband died in a work-related accident, she would have received an award of $46 per week without regard to whether she was dependent for support upon her husband's earnings. This benefit would be payable for the rest of her life and would terminate only upon her remarriage.

This disparate treatment is a consequence of the operation of Missouri's conclusive presumption that wives are dependent upon their husbands' earnings but that husbands are not necessarily dependent upon their wives' earnings. As a result, similarly situated male and female spouses do not receive the same benefits. A widower, like appellant, who is not dependent on his working wife, receives nothing when she dies in a work-related accident, while a widow who is not dependent, or only partially dependent, on her working husband, receives a full death benefit when the husband dies in a work-related accident.

The Missouri statute operates to the disadvantage of both men and women. It discriminates against men to the extent that it denies them benefits upon the death of their working wives. But it also discriminates against women by diminishing the protection afforded to their surviving spouses. A man covered by the workmen's compensation statute knows that if he is killed in a work-related accident, his widow will receive the maximum monetary benefit possible without regard to her actual financial dependence upon his earnings. He is thereby assured that in case of his

death, his wife's overall income will be affected as little as the Act will permit.[1] The working woman, however, does not receive an equal benefit from her employment. Under the Missouri statute, her husband will receive a monetary award to replace her lost income only to the extent he can prove actual dependence on all, or part, of her earnings. The benefits provided to a working woman are therefore significantly less than those provided a similarly-situated working man.

We submit that the decisions of this Court establish that the disparate treatment of widows and widowers under the Missouri statute violates the Equal Protection Clause. In a series of cases involving comparable federal statutes, the Court has recognized that similar conclusive statutory presumptions that wives are dependent on their husbands discriminate against working women. In *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), the Court struck down statutes providing that spouses of male members of the uniformed services were dependents for purposes of obtaining increased fringe benefits but that spouses of female members were not dependents unless they were in fact dependent for more than one-half of their support. Likewise, in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), the Court held invalid a gender-based distinction in the Social Security Act

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[1] The Act awards the dependent spouse 66 2/3% of the deceased's average wage during the year preceding the accident. Mo. Ann. Stat. § 287.240(2) (Vernon 1979 Cum. Supp.).

that granted survivors' benefits to widows but not to widowers. As the Court concluded, "[s]ince the Constitution forbids the gender-based differentiation * * * made in the statutes before us in *Frontiero*, the Constitution also forbids the gender-based differentiation that results in the efforts of female workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men" (420 U.S. at 645).

Frontiero and *Wiesenfeld* control this case and require reversal of the judgment below. It is beyond dispute that the Missouri statute provides disparate treatment for workmen's compensation death awards depending upon whether the claimant is a widow or widower. Widows are clearly favored insofar as they are exempt from the requirement of providing dependency upon their husband's earnings. But "[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig* v. *Boren*, 429 U.S. 190, 197 (1976); *Reed* v. *Reed*, 404 U.S. 71 (1971); *Califano* v. *Webster*, 430 U.S. 313 (1977).

The gender-based distinctions of the Missouri statute do not serve important governmental objectives. Just as Stephen Wiesenfeld was precluded from receiving Social Security survivorship benefits simply because he was a widower rather than a widow, here too, appellant was ineligible for workmen's compensation because he was a widower who was not dependent on his wife's earnings. If appellant had been a widow, the Missouri statute would have presumed dependency upon her husband's earnings. As Mr. Justice Brennan wrote for the plurality in *Califano* v. *Goldfarb*, 430 U.S. 199, 206-207 (1977), "*Wiesenfeld* thus inescapably compels the conclusion * * * that the gender-based differentiation * * * is forbidden by the Constitution, at least when supported by no more substantial justification than 'archaic and overbroad' generalizations, *Schlesinger* v. *Ballard*, [419 U.S. 498, 508 (1975)], or 'old notions,' *Stanton* v. *Stanton*, 421 U.S. 7, 14 (1975), such as 'assumptions as to dependency,' *Weinberger* v. *Wiesenfeld*, [420 U.S. 636, 645 (1975)], that are more consistent with 'the role-typing society has long imposed,' *Stanton* v. *Stanton*, *supra*, at 15, than with contemporary reality. Thus, [the Missouri statute] '[b]y providing dissimilar treatment for men and women who are * * * similarly situated * * * violates the [Equal Protection Clause].' *Reed* v. *Reed*, 404 U.S. 71, 77 * * *. *Weinberger* v. *Wiesenfeld*, *supra*, at 653."

2. In upholding the constitutionality of the gender-based classifications of the Missouri workmen's compensation statute, the decision below found that "[t]he governmental objective was to require employers to alleviate the economic hardship resulting from a working spouse's death. This hardship was seen by the legislatures as more immediate and pronounced on women than on men" (J.S. App. A-10 to A-11). In the court's view, the statutory presumption of depend-

ency "appears to *favor* a woman (widow) rather than discriminate against her, in that it affords the widow death benefits on her husband's compensable death without further proof of dependency" (J.S. App. A-10; emphasis in original). As the court observed (*ibid.*):

> The data available to the general assembly at [the] time [the statute was passed in 1925] no doubt supported the concept that a widow was more in need of prompt payment of death benefits upon her husband's death without drawn-out proceedings to determine the amount of dependency than was a widower. It seems reasonably certain that during the 1920's and 1930's it was more difficult than now for a woman to obtain employment with substantial pay and very difficult for her when, upon her husband's death, she was suddenly thrust into the job market. It seems rather obvious therefore that the purpose of the conclusive presumption of dependency was to satisfy a perceived need widows generally had, which need was not common to men whose wives might be killed while working.

The Missouri Supreme Court's decision therefore rests upon two governmental interests that it regarded as justifying the conclusive presumption of dependence for widows. First, women had suffered the effects of economic discrimination, were therefore less able than men to get employment, and were therefore more in need of benefits. Second, women were more in need of prompt payment than men, and the presumption of dependence accelerated the process of payment.

But, as we shall now show, neither of these interests justifies the gender-based classifications of the statute. Nothing suggests that the disparate treatment of widows and widowers under the Missouri workmen's compensation law is designed to remedy the effects of economic discrimination against women. Nor is there any evidence that the conclusive presumption of dependency materially hastens the process of payment of an award to a widow. In the absence of convincing governmental interests, the statute therefore is invalid under the Equal Protection Clause.

B. The statutory presumption that a wife is dependent upon her husband's earnings cannot be upheld as an attempt to remedy economic discrimination against women

1. The primary justification offered by the Missouri Supreme Court for the statutory presumption of dependency in the workmen's compensation statute is that it was intended to overcome the effects of past discrimination against women. To be sure, this Court has upheld gender-based classifications intended to "redress[] our society's longstanding disparate treatment of women." *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 209 n.8; *Califano* v. *Webster*, *supra*, 430 U.S. at 317. But such legislation can be sustained only if it "operate[s] directly to compensate women for past economic discrimination." *Califano* v. *Webster*, *supra*, 430 U.S. at 318. The "mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual

purposes underlying a statutory scheme." *Weinberger* v. *Wiesenfeld, supra,* 420 U.S. at 648. Rather, where gender-based classifications are presented, this Court has undertaken a more searching review of the underlying purposes of the distinction. See *Califano* v. *Goldfarb, supra,* 430 U.S. at 211 n.9 (Brennan, J., plurality opinion); *Weinberger* v. *Salfi,* 422 U.S. 749, 785 (1975).

Weinberger v. *Wiesenfeld, supra,* and *Califano* v. *Goldfarb, supra,* involved such an examination of gender-based classifications under the Social Security Act. In both instances, the Court rejected the argument that the distinction favoring widows over widowers was designed to redress the economic difficulties confronting women. Thus, in *Wiesenfeld,* the Court found that Congress' purpose in providing benefits to young widows with children was not to redress economic discrimination against women who were unable to provide for themselves. "Rather, [the statute], linked as it is directly to responsibility for minor children, was intended to permit women to elect not to work and to devote themselves to the care of children. Since this purpose in no way is premised upon any special disadvantages of women, it cannot serve to justify a gender-based distinction which diminishes the protection afforded to women who do work" (420 U.S. at 648).

Similarly, in *Califano* v. *Goldfarb, supra,* the Court struck down a comparable statute that awarded death benefits to an aged widow by conclusively presuming her dependency on her husband for support but awarded benefits to a widower only if he could prove dependency. In so holding the Court rejected the argument that the statute was designed to redress the legacy of economic discrimination against women. "On the face of the statute, dependency, not need, is the criterion for inclusion" (430 U.S. at 213) (plurality opinion). By conclusively presuming that all wives are dependent on their husbands, the statute favored those women who were financially independent. "The widows who benefit from the disparate treatment are those who were sufficiently successful in the job market to become nondependent on their husbands. Such a widow is the least likely to need special benefits" (430 U.S. at 221) (Stevens, J., concurring in the judgment).

Here, as in *Wiesenfeld* and *Goldfarb,* the Missouri statute is based upon dependency and not need. The term "dependent" is defined as a "relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury." Mo. Ann. Stat. § 287.240(4) (Vernon 1979 Cum. Supp.). The decisions of the Missouri Supreme Court have stated that the purpose of the Workmen's Compensation Law is to insure that actual dependents of deceased wage earners are compensated for the support lost at the death of a wage earner. See, *e.g., Maltz* v. *Jackoway-Katz Cap Co.,* 336 Mo. 1000, 1006, 82 S.W.2d 909, 912 (1934).[2]

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[2] In *Maltz,* the court stated that the legislature intended to "ameliorate * * * the losses sustained by [the workman]

There is no provision in the Missouri Code supporting the rationale of the decision below that the legislature intended the gender-based distinction to remedy economic discrimination against women. Women and men who are totally supported by spouses with equal incomes receive equal benefits; the women do not receive more. But a nondependent woman receives the same benefits as a totally dependent one, while a nondependent man, like appellant, gets no benefits at all. Like the provisions struck down in *Wiesenfeld* and *Goldfarb*, the Missouri statute provides benefits solely on the basis of dependency. The conclusive presumption of dependency given to widows follows the "then generally accepted presumption that a man is responsible for the support of his wife * * *." *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 215 (plurality opinion). As the Court stated in *Weinberger* v. *Wiesenfeld*, *supra*, 420 U.S. at 645, "[While] the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support[,] * * * such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support."

Finally, the fact that the statute benefits *nondependent* women—those who are already successful enough in the job market to be self-supporting—to the same extent as totally dependent women shows

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and his dependents from accidental injuries received by him in the proper course of his work" (336 Mo. at 1006, 82 S.W. 2d at 912).

beyond question that the Missouri legislature was not attempting to remedy the effects of economic discrimination against women. "To accept the * * * justification [of the Missouri Supreme Court] we must presume that [the Missouri legislature] deliberately gave a special benefit to those females least likely to have been victims of the historic discrimination discussed in *Kahn* [v. *Shevin*, 416 U.S. 351 (1974)]. Respect for the legislative process precludes the assumption that the statutory discrimination is the product of such irrational lawmaking." *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 221 (Stevens, J., concurring in the judgment). Accord: *Orr* v. *Orr*, 440 U.S. 268, 283 (1979).[3]

2. In upholding the gender-based classification of the Missouri statute, the decision below attempted to

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[3] *Kahn* v. *Shevin*, 416 U.S. 351 (1974), upon which the decision below relied (J.S. App. A-4), is therefore distinguishable. There, the Court upheld the constitutionality of a Florida annual $500 real estate tax exemption for all widows. In the Court's view, economic statistics that showed a lower median income for women than men justified "a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden" (416 U.S. at 355). Here, however, the gender-based discrimination in the Missouri workmen's compensation statute is not based upon any presumed general economic need of widows but upon presumed dependency of wives upon their husband's earnings. Thus, the *Kahn* rationale justifying the exemption upon redress of the legacy of economic discrimination against women is inapplicable here. See *Weinberger* v. *Wiesenfeld*, *supra*, 420 U.S. at 648. See also *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 221-224 (Stevens, J., concurring in the judgment).

distinguish *Wiesenfeld* and *Goldfarb* on the ground that they involved a form of "social insurance" (social security) with mandatory employee contributions, while the workmen's compensation benefits at issue here are a substitute for common law rights (see J.S. App. A-8 to A-9).

But this Court rejected much the same distinction only last Term in *Califano* v. *Westcott*, No. 78-437 (June 25, 1979). At issue in *Westcott* was a provision of the Social Security Act (42 U.S.C. 607) which provided AFDC benefits to families with an unemployed father but not to families with an unemployed mother. In striking down the statute, the Court rejected the argument that *Frontiero*, *Wiesenfeld*, and *Goldfarb* were inapplicable because the benefits in those cases "were a form of compensation earned by a women as a member of the labor force, or were directly related to such compensation" while the benefits in *Westcott* were part of a "noncontributory welfare program." As the Court stated (slip op. 7-8):

> The distinction between employment-related benefits and other forms of government largesse may be relevant to equal protection analysis, for example, in determining whether the differential treatment of survivor's benefits denigrates the efforts of the deceased spouse. *Wiesenfeld*, 420 U.S. at 645-647; *Goldfarb*, 430 U.S. at 206-207 (plurality opinion). This does not mean, however, that the Constitution is indifferent to a statute that conditions the availability of noncontributory welfare benefits on the basis of

> gender. The Secretary's argument to the contrary in effect invites a return to the discredited view that welfare benefits are a "privilege" not subject to the guarantee of equal protection. See *Graham* v. *Richardson*, 403 U.S. 365, 374 (1971).

Westcott therefore demonstrates that whether a particular gender-based distinction arises out of a contractual obligation, or as part of a noncontributory scheme of benefits, the standard of review in scrutinizing gender classifications is the same. As the Court observed in *Weinberger* v. *Wiesenfeld*, *supra*, 420 U.S. at 646, "[w]e do not see how the fact that social security benefits are 'noncontractual' can sanction differential protection for covered employees which is solely gender based." [4]

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[4] The Missouri Supreme Court also sought to justify the statute on the ground that widowers are not deprived of benefits entirely but receive them "upon proof of dependency" (J.S. App. A-11). But the fact that some men receive benefits does not by itself cure the discriminatory effect that this statute has upon women by providing them with less protection from their employment than men. See *Califano* v. *Goldfarb*, *supra*; *Jablon* v. *Secretary of HEW*, 399 F. Supp. 118, 128 (D. Md. 1975) (three-judge court), aff'd, 430 U.S. 924 (1977); *Coffin* v. *Secretary of HEW*, 400 F. Supp. 953, 957 (D.D.C. 1975) (three-judge court), appeal dismissed, 430 U.S. 924 (1977). Cf. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971).

C. The statute cannot be upheld on the ground of a presumption that widows' dependency requires that they receive death benefits without the delay of lengthy proceedings

The Missouri Supreme Court further attempted to justify the statute on the ground that it permits widow's benefits to be awarded "without drawn-out proceedings to determine the amount of dependency" (J.S. App. A-10). But even on the assumption that the legislature intended to provide widows with death benefits without protracted hearings, such disparate treatment would be prohibited by the Equal Protection Clause. In *Reed* v. *Reed*, 404 U.S. 71 (1971), the Court unanimously rejected much the same rationale of administrative convenience in striking down a gender-based classification for qualification as an administrator of an estate. The Court held that even though the state's interest in achieving administrative efficiency is not without some legitimacy, "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause" (404 U.S. at 76). See also *Frontiero* v. *Richardson*, *supra*, 411 U.S. at 683; *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 205.

Moreover, economic statistics show that the gender-based classification is not so "precisely structured" (*Parham* v. *Hughes*, No. 78-3 (Apr. 24, 1979), slip op. 5 n.5) as to justify its use as a substitute for a more searching inquiry. See also *Taylor* v. *Louisiana*, 419

U.S. 522, 535 (1975); *Frontiero* v. *Richardson*, *supra*, 411 U.S. at 689 & n.23, *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 205 (plurality opinion). Cf. *Mathews* v. *Lucas*, 427 U.S. 495, 513 (1976). Statistics regarding the employment of married women in Missouri demonstrate that the presumption of dependency of wives upon their husbands' earnings results in significant overpayments which cast substantial doubt on the argument that the presumption is based on administrative convenience. As of 1970, 39.4% of all married women in Missouri were in the labor force. United States Department of Commerce, Census of Population: 1970, Vol. 1, *Characteristics of the Population*, Part 27, Table 44.[5] For the cur-

[5] In 1920, when the Missouri workmen's compensation statute was first proposed, only 7% of married women in Missouri were employed (U.S. Department of Commerce, Fourteenth Census of the United States: 1920, State Compendium, Vol. VI, Table 25). Since that time the percentage has steadily risen (all of these figures are derived from Census Reports of the Department of Commerce). For 1920, 1930, and 1940, citation is to total number of married women in labor force; total number of married women in the state appears in Sixteenth Census of the United States, Vol. IV, Population, Characteristics by Age, Table 6):

Year	% of Married Women Employed	
1930	10.1%	(Vol. IV, Population, Occupations by States, Table 15)
1940	11%	(Vol. III, Population, Labor Force, Table 8)
1950	21%	(Vol. II, Characteristics of Population, Part 25, Table 70)
1960	30%	(Vol. I, Characteristics of Population, Part 27, Table 52)
1970	39.4%	(see above)

rent year, the figure is probably much higher. According to a 1979 report of the Department of Health, Education, and Welfare, in 1978, 48% of all married women in the United States were actively in the labor force. United States Department of Health, Education, and Welfare, *Social Security and the Changing Roles of Women* 21 (Feb. 1979). Accordingly, in a substantial percentage of cases the conclusive presumption of a wife's total dependence is inaccurate, as the widow has income of her own. In the light of these figures, administrative convenience cannot justify the presumption of dependency. Missouri's presumption of dependency "has little relationship to present reality." *Weinberger* v. *Wiesenfeld, supra,* 420 U.S. at 643 n.11. *Cf. Califano* v. *Goldfarb, supra,* 430 U.S. at 239 n.7 (Rehnquist, J., dissenting).

At all events, nothing in the Missouri workmen's compensation statute or its legislative history suggests that the legislature intended to insure that benefits would be paid to widows any more rapidly than benefits are paid to anyone else. There is no exception for widows under the provisions of the statute which permit hearings when the employer and dependents cannot agree on the level of compensation, or other matters relating to an award. See Mo. Stat. Ann. § 287.450 (Vernon 1979 Cum. Supp.). The order of the Industrial Commission referee can be reviewed by the Industrial Commission at the request of any party made within 20 days of the date of the award. There is no exception for awards payable to widows, and no time limitation for the commission's review other than the direction that it commence "as soon as practicable." Mo. Stat. Ann. § 287.480 (Vernon 1979 Cum. Supp.). Within 30 days after the award is entered by the commission, any party can request judicial review. Although all of such cases are given priority status, there is no expedited treatment for awards to widows. Mo. Stat. Ann. § 287.490 (Vernon 1965).

Even where the employer and the claimant agree on an award, the Missouri Code provides that the agreement is not valid until "approved by an administrative law judge or the commission, nor shall an administrative law judge or the commission approve any settlement which is not in accordance with the rights of the parties as given in this chapter." Mo. Ann. Stat. § 287.390 (Vernon 1979 Cum. Supp.). Once again, there is no limit on this review procedure, and no special expedition for claims of dependent widows. In sum, the Missouri Workmen's Compensation Law is not designed to eliminate or short-circuit the procedures for the resolution of widows' death benefit claims, on the basis of a presumption of widows' dependency—even if such a presumption would validly provide a basis for doing so.

II. THIS COURT SHOULD REMAND THE CASE TO THE MISSOURI SUPREME COURT TO SELECT THE METHOD OF CURING THE CONSTITUTIONAL VIOLATION

If, as we submit, the Court holds Missouri's gender-based classification to violate the Equal Protection Clause, there are two equally valid methods available

for curing the defect. The presumption of dependence can be extended to widowers or eliminated for widows.

On several occasions this Court has extended federal benefits to persons previously unconstitutionally excluded from coverage, rather than cutting back on coverage as a means to eliminate a constitutional violation. See *Califano* v. *Westcott*, No. 78-437 (June 25, 1979), slip op. 12-13. Whether the presumption of dependence should be extended or invalidated requires the Court to determine which approach is most consistent with the purposes of the legislation (*Welsh* v. *United States*, 398 U.S. 333, 361-367 (1970) (Harlan, J., concurring); *Kalina* v. *Railroad Retirement Board*, 541 F.2d 1204 (6th Cir. 1976), cert. denied, 431 U.S. 909 (1977); *Arp* v. *Workers' Compensation Appeals Board*, *supra*, 19 Cal.3d at 407-408, 563 P.2d at 856, 138 Cal. Rptr. at 300), as well as to consider the practicalities inherent in extension or invalidation. See, *e.g.*, *Jablon* v. *Secretary of HEW*, 399 F. Supp. 118, 131-132 (D. Md. 1975) (three-judge court), aff'd, 430 U.S. 924 (1977).

In the present case, where a state rather than federal program is involved, there is little legislative history to serve as a guide. In several instances, when state programs involving sex discrimination claims were at issue, this Court declined to direct a specific remedial approach but simply declared the state statute unconstitutional and remanded the case to allow state authorities to choose an appropriate method of remedying the constitutional violation.[6]

[6] The three state court decisions declaring conclusive presumptions identical to Missouri's unconstitutional have taken differing approaches with respect to remedy. In *Arp* v. *Workers' Compensation Appeals Board*, *supra*, the California Supreme Court invalidated the presumption, concluding that expanding the coverage of the Act by extending the presumption is more properly a legislative than judicial duty. 19 Cal. 3d at 409, 563 P.2d at 857, 138 Cal. Rptr. at 301. The New Jersey Supreme Court approved an order extending the presumption to widowers, holding that that approach was "least destructive of the dominant legislative plan." *Tomarchio* v. *Township of Greenwich*, *supra*, 75 N.J. at 76, 379 A.2d at 854. The Appellate Division of the New York Supreme Court extended the presumption to widowers "[u]ntil further legislative action is taken." *Passante* v. *Walden Printing Co.*, *supra*, 53 A.D.2d at 13, 385 N.Y.S.2d at 181.

Orr v. *Orr*, 440 U.S. 268 (1979); *Craig* v. *Boren*, 429 U.S. 190, 210 n.24 (1976); *Stanton* v. *Stanton*, 421 U.S. 7, 13-18 (1975). See also *Skinner* v. *Oklahoma*, 316 U.S. 535, 542-543 (1942). Because either extension or invalidation of the presumption would be constitutionally valid, we submit that the case should be remanded to the Missouri Supreme Court to select the remedy more closely in accord with the intent of the state legislature.[7]

[7] There are 43 states that treat male and female spouses equally under workers' compensation statutes (See Appendix, *infra*). Of that number, only five (Arkansas, California, Maryland, Virginia, and West Virginia) require a surviving spouse living with the deceased at the time of death to prove actual dependency to receive benefits. Several states require a spouse living apart to show actual dependency for support at the time of death.

CONCLUSION

The judgment of the Supreme Court of Missouri should be vacated and the case remanded for further proceedings consistent with the Court's opinion.

Respectfully submitted.

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DECEMBER 1979

APPENDIX

I. States in which workmen's compensation law makes no distinction in the eligibility of widows and widowers for death benefits:

Ala. Code § 25-5-61
Alaska Stat. § 23.30.215
Ariz. Rev. Stat. Ann. § 23-1046
Ark. Stat. Ann. § 81-1315
Cal. Lab. Code §§ 3501(a), 3502 (West), declared unconstitutional in *Arp* v. *Workers' Compensation Appeals Board*, 19 Cal.3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977)
Colo. Rev. Stat. § 8-50-101
Conn. Gen. Stat. Ann. § 31-306 (West)
Del. Code Ann. tit. 19, § 2330
Fla. Stat. Ann. § 440.16 (West)
Hawaii Rev. Stat. § 386-42
Ill. Ann. Stat. ch. 48, § 138.7(a) (Smith-Hurd)
Iowa Code Ann. § 85.42 (West)
Kan. Stat. Ann. §§ 44-508(c), 44-510(b)
Ky. Rev. Stat. § 342.075
La. Rev. Stat. Ann. § 23:1251 (West)
Me. Rev. Stat. Ann. tit. 39, § 2.4
Md. Ann Code art. 101, § 36(8)(a)
Mass. Ann. Laws ch. 152, § 32 (Michie/Law. Co-op)
Minn. Stat. Ann. § 176.111 (West)
Mont. Rev. Codes Ann. § 92-413
Neb. Rev. Stat. § 48-124
Nev. Rev. Stat. § 616.510
N.H. Rev. Stat. Ann. § 281:2-IX
N.J. Stat. Ann. § 34:15-13(f) (West), declared unconstitutional in *Tomarchio* v. *Township of Greenwich*, 75 N.J. 62, 379 A.2d 848 (1977)

N.M. Stat. Ann. § 52-1-17
N.Y. Work. Comp. Law § 16.1-a & b (McKinney)
N.C. Gen. Stat. § 97-39
N.D. Cent. Code § 65-05-17
Ohio Rev. Code Ann. § 4123.59(D)(1) (Page)
Okla. Stat. Ann. tit. 85, § 3.1(2) (West)
Or. Rev. Stat. § 656.204
R.I. Gen. Laws § 28-33-13(a), (b)
S.C. Code § 42-9-110
S.D. Codified Laws § 62-4-21
Tenn. Code Ann. § 50-1013(a)(1)
Tex. Rev. Civ. Stat. Ann. art. 8306, § 8 (Vernon)
Utah Code Ann. § 35-1-71(2)
Vt. Stat. Ann. tit. 21, § 634(2)
Va. Code § 65.1-66(1), (2)
Wash. Rev. Code Ann. § 51.32.050
W.Va. Code § 23-4-10(d)
Wis. Stat. Ann. § 102.51 (West)
Wyo. Stat. § 27-12-408

II. States in which workmen's compensation law distinguishes between widows and widowers for death benefits by presuming that widows, but not widowers, are dependent:

Ga. Code Ann. § 114-414
Idaho Code § 72-410
Ind. Code Ann. § 22-3-3-19 (Burns)
Mich. Stat. Ann. § 17.237 (331)
Miss. Code Ann. § 71-3-25
Mo. Ann. Stat. § 287.240(4)(a) (Vernon)
Pa. Stat. Ann. tit. 77, § 562 (Purdon)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-381

PAUL J. WENGLER,

Appellant,

—v.—

DRUGGISTS MUTUAL INSURANCE COMPANY, and DICUS PRESCRIPTION DRUGS, INC.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

BRIEF *AMICUS CURIAE* OF AMERICAN CIVIL LIBERTIES UNION, ACLU OF EASTERN MISSOURI, NOW LEGAL DEFENSE AND EDUCATION FUND, WOMEN'S EQUITY ACTION LEAGUE, AND WOMEN'S LEGAL DEFENSE FUND

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-381

PAUL J. WENGLER,
Appellant,

v.

DRUGGISTS MUTUAL INSURANCE COMPANY, and
DICUS PRESCRIPTION DRUGS, INC.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

BRIEF AMICUS CURIAE

of

American Civil Liberties Union, ACLU of Eastern Missouri, NOW Legal Defense and Education Fund, Women's Equity Action League, and Women's Legal Defense Fund.

INTEREST OF AMICI

Amici American Civil Liberties Union, ACLU of Eastern Missouri, NOW Legal Defense and Education Fund, Women's Equity Action League, and Women's Legal Defense Fund file this brief with consent of the parties. The letters of consent have been filed with the Clerk of the Court.

Amici are organizations with a dedication to achieving equal justice under law for women and men. They share an abiding conviction that role-typing by sex is a severe and pervasive problem in society, and a firm commitment to work toward the elimination of gender-based discrimination.

This case presents the question whether a law carrying the "baggage of sexual stereotypes" can survive equal protection review, a law according employment-derived benefits more generously when a male wage earner dies than when a female wage earner dies. Amici regard this Court's response to the question as critical to recognition of the equal stature and dignity of female wage earners.

It is amici's position that the law at issue, to the extent it discriminates against men, does so only as a by-product of an offensive albeit traditional way of thinking about women -- as inferior to and therefore dependent on men.

The insidious side of gender-based classifications rooted in longstanding prejudices, yet rationalized as "compensatory," escaped the court below and merits cogent explication by this Court. Amici believe their brief will elucidate two points particularly: (1) purported favors to females as men's appendages downgrade women's status as workers and, in cumulative effect, dampen women's aspirations and limit their opportunities; (2) the sex bias evident in the law at issue and the opinion below indicate the need for explicit statement of doctrine implicit in the Court's recent decisions -- sex is a suspect criterion for official line-drawing.

Opinions Below

The opinion of the Missouri Supreme Court is reported at 583 S.W.2d 162 (1979). The opinion of the Circuit Court of Madison County, Missouri is not reported. Both opinions are set out in the Jurisdictional Statement at A-1 - A-25.

Jurisdiction

This action for workers' compensation death benefits draws in question the validity of 1976 Revised Statutes of Missouri Section 287.240 on the ground that the gender line the statute invokes is repugnant to the equal protection clause of the fourteenth amendment to the Constitution of the United States. The statute denies benefits to a widower absent mental or physical incapacity or proof of his actual dependency upon his wife's wages for his support; it accords full benefits to a widow by conclusively presuming that she is totally dependent upon her husband's wages for her support.

On October 13, 1977, the Circuit Court of Madison County, Missouri held for appellant Wengler, ruling that the equal protection clauses of the Missouri and Federal Constitutions require death benefits for a man whose wife dies in a work-related accident on the same terms as Missouri provides for a woman whose husband dies in a work-related accident. On June 27, 1979, the Missouri Supreme Court reversed; the majority declared the gender classification valid and not repugnant to the Federal or State

Constitution.

A motion for rehearing, filed by appellant Wengler on July 6, 1979, was overruled by the Missouri Supreme Court on July 17, 1979. Notice of appeal to this Court was filed on July 19, 1979. The Jurisdictional Statement was filed on September 6, 1979, appellees filed a Motion to Dismiss on October 5, 1979, and probable jurisdiction was noted on October 29, 1979.

The jurisdiction of this Court to review the decision of the Supreme Court of Missouri on appeal is conferred by 28 U.S.C. Section 1257(2). The following decisions sustain the jurisdiction of this Court to review the judgment on appeal in this case: Stanton v. Stanton, 421 U.S. 7 (1975); Duren v. Missouri, 439 U.S. 357 (1979); Orr v. Orr, 440 U.S. 268 (1979).

Statute Involved

1976 Revised Statutes of Missouri Section 287.240 is set out in full in the Jurisdictional Statement at A-28 - A-31. In relevant part, the statute provides:

> . . .
>
> (2) The employer shall . . . pay to the . . . dependents of the employee a death benefit . . . .
>
> (4) The word "dependent" as used in this chapter shall be construed to mean a relative

by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee and any death benefit shall be payable to them to the exclusion of other total dependents:

(a) A wife upon a husband legally liable for her support, and a husband mentally or physically incapacitated from wage earning upon a wife; . . . .

Question Presented

Whether 1976 Revised Statutes of Missouri Section 287.240, which authorizes workers' compensation death benefits for the spouse of a male worker without regard to dependency, but conditions benefits for the spouse of a female worker upon mental or physical incapacity or proof of dependency, discriminates impermissibly on the basis of gender in violation of the equal protection clause of the fourteenth amendment to the Constitution.

Statement of the Case

Ruth Wengler, wife of appellant Paul J. Wengler, was killed in an accident while working for Appellee, Dicus Prescription Drugs, Inc. Appellant Paul J. Wengler made a claim for workers' compensation death benefits under 1976 Revised Statutes of Missouri Section 287.240. Prior to the July 21, 1977 hearing before the referee, widower Paul J. Wengler filed a memorandum of law contending that Section 287.240 violated the equal protection clauses of the Federal and State Constitutions; at the hearing, the referee noted that the constitutionality of Section 287.240 was at issue.

Under the Missouri law in question, a widower may not obtain periodic workers' compensation death benefits unless he (1) is mentally or physically incapacitated from wage earning; or (2) proves actual dependency upon his wife's wages. By contrast, the Missouri law conclusively presumes a widow totally dependent upon her husband's wages; she qualifies for periodic workers' compensation death benefits without regard to actual dependency. It was stipulated that appellant Paul J. Wengler was not actually dependent for support in whole or in part upon the wages of his wife at the time of her death nor was he mentally or physically impaired from wage earning.

On August 4, 1977, the referee denied benefits to appellant Wengler on the sole ground that he did not meet the sex-specific statutory requirement of incapacity or dependency. On review, the Missouri Labor and Industrial Relations Commission, on

September 9, 1977, adopted the referee's award and denied compensation. On October 13, 1977, the Circuit Court of Madison County, Missouri reversed. That Court held Section 287.240 denied Paul J. Wengler the equal protection of the laws in violation of the Missouri and Federal Constitutions because the statute authorizes death benefits for the surviving spouse of a male worker automatically but denies benefits for the surviving spouse of a female worker absent proof of the survivor's incapacity or dependency.

On June 27, 1979, the Missouri Supreme Court reversed the judgment of the Circuit Court of Madison County, Missouri. In a 5-1 decision, the Missouri Supreme Court upheld the gender line drawn by Section 287.240, mandating dissimilar treatment of workers and their spouses, solely on the basis of sex.

The Missouri Supreme Court majority acknowledged this Court's condemnation in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb, 430 U.S. 199 (1977), of legislation based on "archaic and overbroad generalizations," such as "assumptions as to dependency," statutes "casting female wage earners in a light which denigrates their economic contributions to their families' support." 583 S.W.2d at 165, 167. It also acknowledged the inconsistency of its decision with those of the three state courts that have recently applied Wiesenfeld and Goldfarb to invalidate differential treatment of the spouses of male and female wage earners under workers' compensation statutes. Tomarchio v. Township of

Greenwich, 75 N.J. 62, 379 A.2d 848 (1977); Arp v. Workers' Comp. Appeals Bd., 19 Cal.3d 395, 563 P.2d 849 (1977); Passante v. Walden Printing Co., 53 App. Div.2d 8, 385 N.Y.S.2d 178 (1976). The Missouri Supreme Court majority found these decisions unimpressive; it characterized judgments of this Court and others "dealing with the same or similar matters" as "[i]n most instances" arriving at "self-serving conclusions." 583 S.W.2d at 167. Judge Seiler dissented; he pointed out that this Court, in clear and repeated rulings, "has rejected just such reasoning as that advanced by the majority in support of the result reached." 583 S.W.2d at 171.

Summary of Argument

I.

A familiar stereotype -- the dominant, independent man/the subordinate, dependent woman -- provides the basis for allocating workers' compensation death payments in Missouri. Compensation invariably is paid to the spouse when a male wage earner dies on the job; no compensation is paid for the female wage earner's work-related death unless the spouse is incapacitated or earns too little to sustain himself. This sex-biased arrangement denigrates the female worker's efforts and shrinks the fruit of her labors.

The equal protection principle cannot accommodate a plan that favors and rewards men's employment more than women's. This Court's decisions have explained repeatedly why and how schemes such as Missouri's hurt women. Frontiero v. Richardson, 411 U.S. 677 (1973); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Califano v. Goldfarb, 430 U.S. 199 (1977). Among state courts that have considered the issue in the light of this Court's precedent, only Missouri's Supreme Court has failed to grasp that a law assigning more compensation for a man's work than for a woman's discriminates invidiously on the basis of gender. Freighted as it is with the "baggage of sexual streotypes," Missouri's plan offends the constitutional requirement that the state regulate workers' compensation with an even hand. Orr v. Orr, 440 U.S. 268 (1979); Califano v. Westcott, 99 S. Ct. 2655 (1979).

II.

No close or even sensible relationship exists between the gender classification at issue and any relevant important governmental objective. Workers' compensation, the Missouri Supreme Court said, is "substitutional," it substitutes for common law remedies. But Missouri authorizes wrongful death recovery on a sex-neutral basis. The "substitutional" purpose is therefore frustrated, and in no way served, by the sex-biased compensation plan.

Nor is it tenably urged that a widow's need is the operative concept. The Missouri law responds not to the greater need of widows in comparison to widowers, but to the common law image of husband as supporter, wife, along with child, as dependent. Dependency presumed by law is the core notion, for Missouri's plan compensates alike the impoverished woman, the woman of independent wealth, the woman commanding a well-paid position.

The suggestion that the scheme helps women is perverse. Far from rectifying past discriminatory practices and attitudes toward women, the law in question effectively reduces the wage-benefit package of the female employee below that of an identically situated male employee. The "contributory" or "noncontributory" cast of the plan is irrelevant. Whether or not the employer is sole direct contributor, the female employee is paid less if the benefit package she brings home does not weigh fully as much as her male co-worker's.

Statistics to support the proposition that, in general, widows are dependent more often than widowers cannot salvage Missouri's sex-biased law. This Court's precedent solidly establishes that empirical support does not justify official policies reinforcing "the role-typing society has long imposed." Stanton v. Stanton, 421 U.S. 7, 15 (1975); Craig v. Boren, 429 U.S. 190 (1976); Califano v. Goldfarb, 430 U.S. 199 (1977). Patterning official policy to match familiar stereotypes of women and men casts the weight of government against those who would break the sex-typed mold. Such non-neutrality on the part of government rests on the mischievous assumption that the stereotype not only is, but will and ought to remain accurate.

On three occasions, this Court has upheld narrow, carefully-tailored provisions designed and operating to compensate women for economic disadvantages. None of those instances provides a shred of support for a law like Missouri's, which gives women, qua wage earners, less than a full count. Kahn v. Shevin, 416 U.S. 351 (1974), involving a small real property tax break for widows, did not relate in any way to employment. The tax exemption did not discount women's efforts in the marketplace, it did not rank the woman worker second. Schlesinger v. Ballard, 419 U.S. 498 (1975), and Califano v. Webster, 430 U.S. 313 (1977), to the extent they permit a boost to women as wage earners, stand squarely against Missouri's decision.

III.

Sex classification is handy and habitual, yet with rare exception it serves no purpose functional classification would not serve better. It has operated throughout the nation's history to "put women not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. 677, 684 (1973). "Past abusive discriminatory attitudes toward women," 583 S.W.2d at 167, will be projected far into the future unless official reliance on sexual stereotypes attracts the close review accorded other rankings that shore up and perpetuate society's longstanding prejudices -- classifications based on race, religion and national origin.

Despite this Court's skeptical and scrupulous review of laws rooted in old notions about women's and men's respective spheres, lower courts continue to regard the Court's pronouncements as unclear. The court below, for example, contrasted a "strict scrutiny" review standard with one using the words "substantial relationship," 583 S.W.2d at 167, and apparently equated the latter with cursory review. So long as the Court holds back clarion statement that the gender criterion is indeed "suspect," a procession of lower court dispositions, such as the one now before the Court, may be anticipated.

Since Reed v. Reed, 404 U.S. 71 (1971), this Court has reviewed a parade of cases challenging laws and official practices that pigeonhole people unfairly solely on the basis of their sex. The procession demonstrates that explicit designation of sex as a suspect criterion is overdue. Such designation provides the only wholly satisfactory starting point for addressing every remnant of the common law heritage that denied women independence and instead caused them to be covered, "clouded and overshadowed" by men.

ARGUMENT

I.

MISSOURI'S WORKERS' COMPENSATION DEATH BENEFIT SCHEME, DESIGNATING WIFE AS DEPENDENT, HUSBAND AS SUPPORTER, HEAPS ON THE WAGE-EARNING WOMAN AND HER SPOUSE THE "BAGGAGE OF SEXUAL STEREOTYPES"; LOADING THIS BAGGAGE ON WOMEN AND MEN VIOLATES THE EQUAL PROTECTION PRINCIPLE.

The statutory classification at issue assures compensation to the surviving spouse when a male wage earner dies. No compensation is afforded the surviving spouse when a female wage earner dies unless the survivor is incapacitated or has not earned enough to sustain himself. The working man's spouse recovers in full regardless of her own earnings and wealth. The working woman's spouse, by contrast, if he is not disabled from wage earning, recovers nothing beyond burial expenses unless he meets a stringent dependency test. However significant the wife's contributions to the family's income, indeed, even if she was the family's principal breadwinner, her spouse will go remediless so long as he has the means to support himself. See Dykes v. Thornton, 282 S.W.2d 451, 454 (Mo. 1955) (defining "dependent" as "not self-sustaining").

In short, Missouri allocates this death benefit derived from employment in accordance with a familiar stereotype. The male wage earner is officially designated a

worker who always counts.[1] His work-related death invariably results in compensation to his spouse. The female wage earner is assigned lower status. Her work-related death passes without compensation absent "substantial evidence" that her surviving spouse lacked resources necessary for his own maintenance. See Kemmerling v. Karl Koch Erecting Co., 338 Mo. 252, 256, 89 S.W.2d 674, 676 (1936) (as to person not presumed dependent "because of the relationship existing between the parties," no death

1/ A world of male workers, female surviving spouses, is suggested in annual reports filed under the law. See, e.g., Missouri Workmen's Compensation Commission, 15th Annual Report at 7 (1942), 16th Annual Report at 7 (1943), 17th Annual Report at 7-8 (1944):

> The Missouri Workmen's Compensation Commission has always kept in mind the beneficent aspect of the law, that is to furnish prompt and equitable compensation to injured employees, their widows and dependents . . . . (emphasis supplied)

The real world never conformed to the "workman and wife" model and today that image is distant from the life situations of most couples. Over 50% of women with husbands present and children under 18 are in the paid labor force. Bureau of Labor Statistics, U.S. Dep't of Labor, Marital and Family Characteristics of the Labor Force, March 1978, table 5 (1978).

benefit is due absent "substantial evidence" of dependency); Dykes v. Thornton, supra.[2]

Classification of this genre is hardly new to this Court. Time and again in the past several years the Court has explained why the equal protection principle precludes legislation cast in an independent male/dependent female mold. Such gender-based differentiation, the Court has emphasized, assumes gainful employment as a domain in which men come first, women second, favors and rewards men's employment more than women's, underestimates women's contributions to family support and overestimates men's, shores up and perpetuates a view of women as less valued, more expendable workers than

2/ Missouri considers workers' compensation as "substitutional for" tort remedies in favor of the injured employee or his or her survivors. 583 S.W.2d at 164, 167; Motion to Dismiss at 6. In glaring contrast to the purported substitute, Missouri's wrongful death action provisions are gender-neutral. See 1976 Revised Statutes of Missouri 537.080 (placing husband and wife on an equal footing as persons entitled to recover for wrongful death). Elsewhere, the "substitute" matches the tort provision by treating husband and wife as equals in both contexts. See Cataldo v. Admiral Inn, Inc., 227 A.2d 199 (R.I. 1967).

men.[3/] See Frontiero v. Richardson, 411 U.S. 677 (1973) (providing wife of male service member with dependents' benefits but not husband of female service member absent proof wife supplied more than one-half of husband's support "heap[s] on" women wage earners additional economic disadvantages);

3/ For other Missouri law indications of long-held notions regarding wife's subordination to husband in economic endeavor, see 1976 Revised Statutes of Missouri 442.050 (woman can convey her real property by power of attorney only if she executes power jointly with her husband); Campbell v. Campbell, 281 S.W.2d 314, 317 (Mo. Ct. App. 1955) (husband may determine where marital unit will reside regardless of wife's desires); Easley v. Easley, 266 S.W.2d 28, 31 (Mo. Ct. App. 1954) (if wife refuses to abide by husband's choice of residence, she is stamped a deserter). Recent reform, however, suggests dawning appreciation of the unfairness of old ways. See 1976 Revised Statutes of Missouri Sections 452.315, 452.335, 452.355 (maintenance, costs and attorneys fees may be awarded to either spouse in divorce and separation proceedings); 1969 Revised Statutes of Missouri 293.060, repealed, Laws 1975, p. 310, § 1 (ending prohibition on women's employment in mining); 1969 Revised Statutes of Missouri 451.090, amended, Laws 1974, p. 975, § 1 (eliminating male/female 21/18 marriage age differential by setting 18 as age for both sexes); 1969 Revised Statutes of Missouri 564.680, repealed, Laws 1977, p. 659 § 1 (ending ban on work by girls under 18 as telegraph messengers).

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (provision of child-in-care social security benefit to deceased wage earner's widow, but not widower, denigrates the efforts of gainfully employed women); Califano v. Goldfarb, 430 U.S. 199 (1977) (equation of the terms "widow" and "dependent surviving spouse" in Social Security Act reflects a traditional way of thinking about females as inferior to males). See also Taylor v. Louisiana, 419 U.S. 522 (1975), followed in Duren v. Missouri, 439 U.S. 357 (1979) (rejecting once pervasive jury service exemptions based on women's "presumed role in the home"); Stanton v. Stanton, 421 U.S. 7 (1975) (rejecting once pervasive sex-based age of majority differential as a "self-serving" reflection of "the role-typing society has long imposed"); Craig v. Boren, 429 U.S. 190 (1976) (applying Stanton to sex-based age classification that discriminated against males); Schlesinger v. Ballard, 419 U.S. 498, 507, 508 (1975) ("overbroad generalizations" of female dependency are not tolerated under the Constitution); Califano v. Webster, 430 U.S. 313, 317 (1977) (a statutory scheme is not compatible with equal protection when it involves "casual assumptions that women are 'the weaker sex' . . . more likely to be . . . dependents").

Consolidating the decade's precedent, the Court emphasized last Term the insidious quality of legislation that pigeonholes men and women solely on the basis of sex. In Orr v. Orr, 440 U.S. 268 (1979), the Court held intolerable under the equal protection principle legislation permitting awards of alimony to women but not to men. Use of sex

to signal economic need "reinforce[s] stereotypes about the 'proper place' of women and their need for special protection," the Court observed. Because gender-based classifications bear the "inherent risk" of perpetuating sex-role stereotypes, even a purportedly compensatory law must be phrased in gender-neutral language or, if it draws a gender line, must be "carefully tailored" to avoid carrying with it the "baggage of sexual stereotypes." Id. at 283. Missouri's broad and casual assumption that wives are dependent, husbands, independent, hardly fits the description. The gender-based classification is not "carefully tailored." It is an oversized cloth not trimmed at all.

Similar analysis appears in Califano v. Westcott, 99 S. Ct. 2655 (1979), in which the Court ruled unanimously that according welfare benefits to families with unemployed fathers, but not to families with unemployed mothers, does not comport with equal protection. Women were purportedly favored by the legislation at issue in Orr, men by the law in question in Westcott. But both legislative products revealed, as does the law in the case at bar, the habitual assumption that the man is the family's breadwinner, while the woman's employment role, if any, is secondary. See 99 S. Ct. at 2662. No leeway is open to the legislature, the Court concluded, to proceed in reliance on the "baggage of sexual stereotypes." 99 S. Ct. at 2663 (citing Orr, at 283).

Even before this Court's decisions in Wiesenfeld and Goldfarb, supra, the clear trend in the states was toward elimination of gender-based differentials in workers'

compensation death benefits. See Note, Presumption of Dependence in Workers' Compensation Death Benefits As a Denial of Equal Protection, 9 U. Mich. J. L. Reform 138 (1975) (pointing out that under sex-biased statutes female employees effectively earn less in terms of dollar benefits for their families than do similarly situated male employees). After Wiesenfeld, New York's scheme, similar to Missouri's, was held invalid. Passante v. Walden Printing Co., 53 App. Div.2d 8, 385 N.Y.S.2d 178 (1976). Declaring Wiesenfeld dispositive, the New York court stressed that the death benefit "derive[d] from employment itself rather than mere survivorship." 53 App. Div.2d at 11, 385 N.Y.S.2d at 180.[4/] Far from rectifying past discrimination against women, the court said, the sex-biased statute "gives support to a philosophy which minimizes the importance of employment for women, thus using past discrimination as a justification for continuing to burden them as a class with economic disadvantages." 53 App. Div.2d at

4/ Kahn v. Shevin, 416 U.S. 351 (1974), is therefore inapposite. According women qua wage earners a full count was not an issue as to the Florida real property tax legislation the Court upheld. See Tomarchio v. Township of Greenwich, 75 N.J. 62, 71, 379 A.2d 848, 852 (1977).

12, 385 N.Y.S.2d at 180.[5/]

After Goldfarb, the notion that laws like Missouri's were fair to men and favors to women became untenable. California's Supreme Court ruled that presuming wife, but not husband, dependent "potentially disadvantages large numbers of the very sex [the statute] purports to aid, and does so by perpetuating the paternalistic notion that a woman's financial contribution is unlikely to be of substantial importance to the family unit, [thus] the statute cannot be said . . . to rest upon some ground of difference having a fair and substantial relation to the object of the legislation."

5/ In stark contrast to the law at issue here, a scheme which downgrades women as wage earners, the transitional legislation involved in Califano v. Webster, 430 U.S. 313 (1977), represented an effort to bolster the position of the wage-earning woman. Moreover, as the Court pointed out in Webster, laws guaranteeing equal treatment for women and men in all employment-related terms, conditions and benefits, not "romantically paternalistic" provisions, respond realistically and effectively to "past abusive discriminatory attitudes toward women." 583 S.W.2d at 167.

Arp v. Workers' Comp. Appeals Bd., 19 Cal.3d 395, 407, 563 P.2d 849, 855-56 (1977). New Jersey's Supreme Court, in a particularly well-reasoned opinion, concluded:

> In the context of our workers' compensation scheme, the dependency provisions for widows were undoubtedly conceived as a remedial measure to help women overcome economic handicaps. They are based, however, on assumptions of female economic disablement which no longer enjoy currency. The net result of this stock approach is that a married woman's employment does not yield the same benefits which a married man's generates for his surviving spouse and family. Comparing men and women as employees, the ultimate effect of the dependency provisions upon a woman worker is to denigrate the worth of her efforts and shrink the fruit of her labors. From this vantage point, the statutory dependency scheme hurts rather than helps women.

Tomarchio v. Township of Greenwich, 75 N.J. 62, 73, 379 A.2d 848, 853 (1977).

Missouri's Supreme Court not only had Wiesenfeld and Goldfarb to guide it. Orr was decided well over three months before the Missouri Supreme Court issued its judgment. Westcott was decided some three weeks before Paul J. Wengler's motion for rehearing was overruled. No other jurisdiction has failed to follow the course repeatedly marked by this Court. Only Missouri continues to march to a different tune. Cf. Duren v. Missouri, 439 U.S. 357 (1979); Lee v. Missouri, 439 U.S. 461 (1979) (in continuing to invite "any woman" to refrain from jury service, Missouri failed to heed "principles enunciated in Taylor v. Louisiana, 419 U.S. 522 (1975)"). It is impossible to avoid the conclusion that in this case the Missouri motto "Show Me" has been pressed too far.

II.

THE GENDER-BASED MEANS EMPLOYED IN MISSOURI'S WORKERS' COMPENSATION DEATH BENEFIT SCHEME LACKS THE REQUISITE CLOSE RELATIONSHIP TO AN IMPORTANT GOVERNMENTAL OBJECTIVE; FAR FROM REMEDYING DISCRIMINATION WOMEN ENCOUNTER IN THE MARKETPLACE, THE CLASSIFICATION REINFORCES THAT DISCRIMINATION.

Summarizing the steady course of adjudication since 1971, the Court explained last Term:

> Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination . . . . This Court's recent cases teach that such classification must bear a "close and substantial relationship to important governmental objectives" . . . .

Personnel Administrator of Massachusetts v. Feeney, 99 S. Ct. 2282, 2293 (1979), quoting from Craig v. Boren, 429 U.S. 190, 197 (1976). The gender-based classification at issue utterly fails to meet that standard. It bears no sensible relationship whatever to objectives, real or hypothesized, identified by the court below.

The Missouri Supreme Court pointed first to the general purpose of the law, to substitute a secure compensation arrangement for uncertain tort remedies in favor of an injured worker or the worker's survivors. See 583 S.W.2d at 167. Second, the court below suggested that the legislature sought to assure prompt payment of death benefits to those with a perceived need; the legislature therefore invoked sex as an automatic indicator of need. 583 S.W.2d at 167-68.

With respect to the "substitutional" purpose of the law, the Missouri scheme is perverse. It substitutes for the sex neutrality of wrongful death recovery a sex-biased plan. And it effectively reduces the wage-benefit package of the female employee below that of an identically situated male employee.

Turning to sex as a proxy for need, the post hoc rationalization will not wash. The legislature plainly relied not on any need standard, but on the common law image of husband as supporter, wife as his dependent. The operative concept surely is dependency presumed by law, not need, for Missouri compensates alike the impoverished woman, the woman of independent wealth, the woman commanding a well-paid position.

A. The gender-based scheme frustrates the substitutional purpose of workers' compensation.

Missouri's workers' compensation law, in common with similar laws in other states, was designed "to substitute finite liability for the 'fortuities' of the available common law remedies." Leicht v. Venture Stores, Inc., 562 S.W.2d 401, 402 (Mo. Ct. App. 1978). Common law remedies required a showing of fault, they were costly to pursue and subject to the law's delay. In return for a prompt and certain remedy for the loss occasioned by employment-related death or disability, the worker and the worker's spouse relinquished the right to pursue relief in tort against the employer. Todd v. Goosetree, 493 S.W.2d 411, 416 (Mo. Ct. App. 1973). See generally A. Millus & W. Gentile, Workers' Compensation Law and Insurance (1976).

But in substituting the compensation remedy and making it the exclusive means by which a spouse could recover death benefits from the employer, Missouri sex-typed the characters.

Missouri's wrongful death act has always been gender neutral.[6] Widows and widowers have the same right to sue and recover. Awards are not tied to a dependency standard.[7] Recovery is not limited to money the deceased would have supplied had she lived. See Hertz v. McDowell, 358 Mo. 383, 389-90, 214 S.W.2d 546, 549 (1948). Rather, the concept "pecuniary loss" encompasses tasks the deceased would have performed for, or services the deceased would have rendered to the surviving spouse. See, e.g., Bulkley v. Thompson, 240 Mo. App. 588, 602, 211 S.W. 2d 83, 92 (1948).

6/ See, e.g., Ann. Mo. Stat. § 537.080 (Vernon Supp. 1977) ("damages may be sued for and recovered (1) By the spouse . . . of the deceased"), amending Ann. Mo. Stat. § 537.070 (Vernon 1955) (damages "may be sued for and recovered: (1) By the husband or wife of the deceased").

7/ See, e.g., Ann. Mo. Stat. § 537.090 (Vernon Supp. 1977) (a spouse may recover "such damages as will fairly and justly compensate . . . for any damages he . . . sustained and [is] reasonably certain to sustain in the future as a direct result of such death"), amending Ann. Mo. Stat. § 537.090 (Vernon 1953) (juries may award the husband or wife "such damages . . . as they may deem fair and just, with reference to the necessary injury resulting from such death").

Whatever its other shortcomings, the tort remedy did recognize husbands and wives as individuals of equal standing. By contrast, Missouri's compensation substitute is in fact no substitute at all when a Ruth Wengler dies. But cf. Cataldo v. Admiral Inn Inc., 227 A.2d 199 (R.I. 1967). Rather, it is a flat denial of any payment from the employer to the surviving spouse.[8]

8/ Only a dwindling minority of states retain provisions kin to Missouri's. Most legislation has been adjusted to conform to current equal protection doctrine regarding sex classification. The federal workers' compensation law typifies the general pattern. 5 U.S.C. §§ 8101, 8133 (conclusive presumption of dependency -- in effect, a substantive rule that dependency in fact is irrelevant -- applies to widow and widower alike).

In Missouri, even a dependent widower might go remediless if it is found that he should not have been dependent. Cf. Ricks v. H.K. Porter, Inc., 439 S.W.2d 164 (Mo. 1969) (20 year old stepgrandson, though in fact supported by deceased wage earner, merited no compensation because he was capable of self-support); W. Malone, M. Plant & J. Little, The Employment Relation 427 (1974) (where adult female claims she is dependent, courts do not inquire into her ability to earn her own living; where adult male asserts dependency, courts inquire whether he could and should support himself).

B. Missouri's plan effectively reduces the wage-benefit package of the female employee below that of an identically situated male employee.

Beyond debate, workers' compensation is a benefit generated through a wage earners employment, a part of the employee's total compensation package. Tomarchio v. Township of Greenwich, 75 N.J. 62, 74, 379 A.2d 848, 853 (1977); see Oi, Workmen's Compensation & Industrial Safety, in I Supplemental Studies for the National Commission on State Workmen's Compensation Laws 41, 63, 66-67, 99-100 (1973). The bundle of benefits, apart from direct wage payments, constitutes a significant share of work-derived compensation. Accounting for approximately 17 percent of total compensation in 1968, id. at 67, 100, employment-related benefits amounted to 25 percent of employers' payroll costs in 1975. Note, Sex Discrimination in Employee Fringe Benefits, 17 Wm. & Mary L. Rev. 109 (1975). An employment-related benefit may entail direct contributions by both employer and employee or it may be funded by the employer alone. For example, some hospitalization and pension plans are funded by joint contributions, but it is becoming more common for employers to pay the entire cost of such programs. See Petermann, Fringe Benefits of Urban Workers, 94 Monthly Lab. Rev. 41, 43-44 (Nov. 1971).

Missouri's Supreme Court indulged the misguided notion that female employees are shortchanged because their spouses are not protected to the same extent as are spouses of male employees only when the benefit plan is contributory. 583 S.W.2d at 167. Where the employer is sole contributor, as in the case of workers' compensation,[9] then, according to the Missouri Supreme Court, it is proper to forget the female worker. Conveniently casting from sight the worker whose labor generates the benefit, the court below characterized the scheme as a favor to women. After all, widows are compensated, widowers are not.

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9 The notion that employees pay nothing for a "noncontributory" program is surely naive. See Gregory & Gisser, Theoretical Aspects of Workmen's Compensation, in I Supplemental Studies for the National Commission on State Workmen's Compensation Laws 107, 108 (1973) (economists are perplexed by the assumption in non-economic literature that, unless the employee "contributes," the incidence rests solely on the employer or is passed on to the consumer); Vroman, The Incidence of Compensation Insurance Premium Payments, in II Supplemental Studies for the National Commission on State Workmen's Compensation Laws 241 (1973) (labor bears most of the burden through the impact of the payments on their relative share of income in the economy).

But if it were appropriate to shroud the female worker when a benefit program covering employees' families is funded solely by the employer, then even the universally embraced equal pay concept would be substantially undermined. Some seven years ago, this Court, in an 8-1 judgment, firmly rejected the reasoning Missouri would revive. In Frontiero v. Richardson, 411 U.S. 677 (1973), the Court held unconstitutional noncontributory housing and health care fringe benefit programs covering the wives of military officers without regard to dependency, the husbands of military officers only if they proved they depended on their wives for their support.

In sum, the bright line the Missouri Supreme Court discerned between contributory and noncontributory programs is less than a will o' the wisp.10/ Whether or not the employer is sole direct contributor, the female employee is paid less if the benefit package she brings home does not weigh fully

10/ The line was seen as a means to distinguish Califano v. Goldfarb, 430 U.S. 199 (1977), and Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). Others have understood those decisions better. Wiesenfeld and Goldfarb, together with Frontiero, broadly condemn "differential treatment depriving women of the family protection that men receive as a result of their employment." Tomarchio v. Township of Greenwich, 75 N.J. 62, 72, 379 A.2d 848, 852 (1977).

as much as her male co-worker's.11/

11/ The point is underscored in federal provisions banning gender-based discrimination in employment. E.g., 5 U.S.C. § 7202 stipulates that all regulations granting benefits to government employees

> (b) shall provide the same benefits for a married female employee and her spouse and children as are provided for a married male employee and his spouse and children.

Further, 5 U.S.C. § 7202 declares that

> (c) any provision of law providing a benefit to a male Federal employee or to his spouse or family shall be deemed to provide the same benefit to a female Federal employee or to her spouse or family.

Applicable to the private sector as well as to municipal and state employment, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq., unquestionably has the same thrust. Sex Discrimination Guidelines issued by the Equal Employment Opportunity Commission (29 C.F.R. § 1604.9(d)) therefore provide:

> It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees . . . .

C. Employment and marital relationship, not a woman's need, are the criteria relevant to Missouri's plan.

Although the statute at issue is "phrased in terms of dependency, not need,"[12] Missouri's Supreme Court has hypothesized "perceived need" as the basis for the gender line. 583 S.W.2d at 168. This Court has heard that recitation before. It echoes the attempt in Califano v. Goldfarb, 430 U.S. 199 (1977), to shield the classification there invalidated by attributing to it a wholly benign, compensatory purpose.[13]

12/ Califano v. Goldfarb, 430 U.S. at 213.

13/ With respect to gender-based classification, this Court has repeatedly cautioned: "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield" protecting legislation against close review. Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975).

The cover spread here is as transparent as the one in Goldfarb. In both cases, the legislation established parity between wives and husbands who were not self-sustaining, but extended to financially secure wives a benefit withheld from financially secure husbands. See Califano v. Goldfarb, 430 U.S. at 221 (Stevens, J. concurring); cf. Orr v. Orr, 440 U.S. 268, 282 (1979). The sex-based distinction between self-sustaining wives and self-sustaining husbands makes no more sense now than it did three years ago.

In short, "nothing whatever suggests a reasoned . . . judgment [by the Missouri legislature] that nondependent widows should receive benefits because they are more likely to be needy than nondependent widowers." Califano v. Goldfarb, 430 U.S. at 214. The afterthought that the Missouri legislature deliberately set out "to remedy the arguably greater needs of the [widow]," is unconvincing. See id. at 217. The far more plausible explanation, there was "an intention to aid the dependent spouses of deceased wage earners, coupled with a presumption that wives are usually dependent." Ibid. Neither in design nor in operation is the provision a welfare benefit for the needy. Rather, the categorization is a typical, reflexive response to "archaic and overbroad" generalizations[14] about men as breadwinners and women as dependents. Enacted in an era when "those in positions of power accepted as

14/ Schlesinger v. Ballard, 419 U.S. 498, 508 (1975).

axiomatic" women's subordination to men,[15] the provision simply will not bear revisionist interpretation.

D. Statistics depicting women as primarily wives, only secondarily workers, supply no fair basis for sex-typing a workers' compensation law.

Statistics in support of a stereotype, appellees suppose (Motion to Dismiss at 5), salvage sex-biased laws. But this Court has made it plain that empirical support does not justify official policies perpetuating "the role-typing society has long imposed." Stanton v. Stanton, 421 U.S. 7, 15 (1975).

Statutory preference of men over women as estate administrators was invalidated although it could be documented that, in business affairs, men are more active than women. Reed v. Reed, 404 U.S. 71 (1971). A dependency test applicable to widowers but not widows was rejected in Califano v. Goldfarb, 430 U.S. 199 (1977), although statistics were pressed with vigor to establish that 78.5% of all married women, and 88.5% of those over fifty-five are dependent on their husbands. Id. at 238

15/ Arp v. Workers' Comp. Appeals Bd., 19 Cal.3d 395, 404, 563 P.2d 849, 854 (1977). See note 3 supra.

n. 7 (Rehnquist, J., dissenting).[16] See also Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975); Frontiero v. Richardson, 411 U.S. 677, 681-82 (1973). For resort to generalizations about "the way women (or men) are," however amusing in Mozart opera,[17] is incompatible with "the normative philosophy that underlies the Equal Protection Clause." Craig v. Boren, 429 U.S. 190, 204 (1976) (text at n. 17). Patterning official policy to match familiar stereotypes casts the weight of government against those who would break the sex-typed mold. Such line-drawing has all the earmarks of self-fulfilling prophecy. It rests on the mischievous assumption that the stereotype not only is, but will and ought to remain accurate. See Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U. L. Rev. 675, 725-26 (1971).

16/ It appears, however, that a significantly lower percentage of women would in fact rank as dependents under the rigid and stringent one-half support test the Social Security Act specified. See Brief for Appellee, Califano v. Goldfarb, at 30-34, 43-45.

17/ Cosi Fan Tutte.

As its very name announces, the law at issue compensates workers. There is special irony in labelling that law a "favor" to females when it operates to reduce the compensation a woman's labor attracts. Even when the law was new, it adversely affected significant numbers of women.18/ Today, the discount effect is a reality in the "typical" American family, for the two-earner couple has become a "well-established fact of American life." Bureau of Labor Statistics, U.S. Dep't of Labor, Women in the Labor Force: Some New Data Series, Report 575, at 4 (1979); see id. at 1 (by 1979, women over age 16 accounted for over 40% of the labor force and over 50% of all women over 16 worked).

In March 1978, 59.6% of all women ages 16-54 were in the paid labor force; for married women with husbands present, the participation rate was 55.4%. Smith, The Movement of Women into the Labor Force, in The Subtle Revolution 1, 9 (Urban Institute 1979) (source: Bureau of Labor Statistics, U.S. Dep't of Labor, unpublished tabulations

18/ The law originated in 1925. 583 S.W.2d at 164. Women 14 years of age and over constituted 20.4% of the labor force in 1920, and 21.9% in 1930; 22.7% of all women 14 and over worked in 1920, 23.6% in 1930. Employment Standards Administration, Women's Bureau, U.S. Dep't of Labor, 1975 Handbook on Women Workers, Bulletin 297, at 11.

from the March 1978 Current Population Survey). Three-quarters of the women in the labor force worked full time or were seeking full-time employment. Id. at 10. Women who work full time the year round contribute nearly 40% of family income. Hayghe, Working Wives' Contribution to Family Income in 1977, in U.S. Dep't of Labor, Monthly Labor Review 62, 64 (October 1979).19/

What does a law like Missouri's signal to women even when the majority of them are in the marketplace?20/ As worker, the compensation law instructs, woman counts second. This subordinate status reinforces a view long promoted in society. Despite her paid job, the woman is expected to carry a vastly disproportionate share of the homework, to support by her services the man whose job counts first. In this light, the notion that the Missouri scheme is a corrective for "past abusive discriminatory attitudes toward women," 583 S.W.2d at 167, defies reason.

19/ In dual earner families with incomes below $15,000, the wife's full-time earnings account for considerably more than 40%. The figures for 1975: families with incomes below $10,000, wife contributed 59.5%; families with incomes between $10,000 and $14,999, wife contributed 44.7%. Bureau of Labor Statistics, U.S. Dep't of Labor, U.S. Working Women: A Databook 38, Table 41 (1977).

20/ Relying on 1960's figures this Court used in Kahn v. Shevin, 416 U.S. 351 (1974), the court below incorrectly assumed the one (male) breadwinner family remains the dominant pattern. 583 S.W.2d at 165.

Rather, the law shores up the attitudes that impede women from seeking economic opportunity on an equal basis with men. See Barrett, Women in the Job Market: Occupations, Earnings and Career Opportunities, in The Subtle Revolution 31, 59 (Urban Institute 1979).

E. Any "favor" Missouri's scheme accords women as wives is offset by the disadvantage the plan heaps on women as wage earners.

On three occasions, this Court has upheld gender classifications on the ground that they operated solely to compensate women for past and present economic disadvantages. Kahn v. Shevin, 416 U.S. 351 (1974); Schlesinger v. Ballard, 419 U.S. 498 (1975); and Califano v. Webster, 430 U.S. 313 (1977). Each was perceived as a case in which some women were helped and no women were harmed by the gender line at issue. Kahn involved no worker's compensation. The little real property tax break there at stake (a $15. saving at the then applicable tax rate) bore no relationship to employment. It did not discount women's efforts in the marketplace, it did not rank the woman worker

second.21/

Schlesinger v. Ballard arose in a setting in which discrimination against women ran wild. Barred by law from serving on ships at sea22/ and subjected to a variety of other restrictions,23/ a female officer in the Navy could hardly expect to rise to the top of the tree in a race with a male officer. This Court was asked to intercede at the one point in the rampantly sex-based system at which women arguably received a boost.24/ No litigant in that case sought the Court's review of the network of laws and regulations holding women back. Under the circumstances, the Court could not be expected to alter one small piece in a large, complex puzzle, a provision that happened to

21/ Moreover, Kahn is specifically and narrowly tied to the "large leeway" states historically have enjoyed in framing property tax legislation. 416 U.S. at 355. It would utterly pervert this Court's meaning to use Kahn as an excuse for any classification that, directly or indirectly, denigrates the position of woman as wage earner. See Tomarchio v. Township of Greenwich, 75 N.J. 62, 71, 379 A.2d 848, 852 (1977).

22/ The law barring assignment of women to ships was held unconstitutional by Judge Sirica in 1978, Owens v. Brown, 455 F.Supp. 291 (D.D.C.), and the Navy pursued no appeal.

23/ See generally M. Binkin & S. Bach, Women and the Military (Brookings Institution 1977).

24/ Male officers twice passed over for promotion were subject to mandatory discharge; female officers could remain in service for thirteen years before mandatory discharge for lack of promotion.

harm a man,[25] while leaving untouched the host of provisions that harmed women.

Califano v. Webster entailed a small step Congress took in 1956 to grapple with disadvantages encountered by women qua wage earners. Those disadvantages included depressed wages (unequal pay, in 1956, was the norm) and early retirement forced on women but not on men. Congress sought to limit projection of discriminatory job market conditions into the female worker's post-retirement years. Later, Congress addressed the problem directly. It mandated equal

25/ Lt. Ballard's case was idiosyncratic. His "mustang" status (he served as an enlisted man for seven years before becoming an officer) made a guaranteed thirteen-year officer tenure attractive to him; it would bring his total service to twenty years, thus assuring him a Navy pension. Many female officers, however, viewed the thirteen year tenure provision as operating in the typical case to the disadvantage of women. The normal period in which the male officer went "up or out" was nine years. If he went "out," he would get severance pay. But the female officer who wished to leave short of thirteen years would not be entitled to severance pay. Nor would thirteen years' service bring her within range of the twenty years needed for retirement on pension. Her male counterpart, out after nine years, would have the chance to start up the ladder, and accrue pension credits, in a new career four years earlier. For a female officer's effort to explain how she was harmed by the differential, see Two v. United States, 471 F.2d 287 (9th Cir. 1972), cert. denied, 412 U.S. 931 (1973).

pay[26] and nondiscrimination in hiring, firing and all terms and conditions of employment.[27] When Congress extended those measures to most sectors of the economy, it phased out the differential at issue in Webster. As this Court recognized, women wage earners were helped far more substantially by equal compensation and opportunity guarantees than they were by the transitional gender classification inspected in Webster.

In sum, Kahn v. Shevin provides not a shred of support for giving a female wage earner less than a full count. Schlesinger v. Ballard and Califano v. Webster, to the extent they permit a boost to women as wage earners, stand solidly against the Missouri decision.

26/ Equal Pay Act of 1963, 29 U.S.C. § 206(d).

27/ Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq.

III.

THE PLAIN IMPORT OF THIS COURT'S PRECEDENT BEARS EXPRESS DECLARATION: SEX IS A SUSPECT CRITERION.

It was once this Court's view that women, like children, are indeed "persons" and may be "citizens" within the meaning of the fourteenth amendment, but that women, again like children, are appropriately placed in compartments separate from men. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 168 (1874).28/ Missouri's workers' compensation death benefit arrangement, enacted in an era when that habit of thought held sway,29/ reflects the once standard branding: wives, together with children under the age of eighteen, rank as "dependent"; husbands count as self-standing family heads, supporting but rarely dependent on the family unit. 1976 Revised Statutes of Missouri Section 287.240 (4)(a), (b).

28/ See generally Babcock, Freedman, Norton & Ross, Sex Discrimination and the Law 1-108 (1975); Davidson, Ginsburg & Kay, Sex-Based Discrimination 2-59 (1974).

29/ See note 3 supra. The relevant statutory provisions remain substantially as initially adopted by Missouri's legislature in 1925. 583 S.W.2d at 164. Over two decades later, it was still the view that the Constitution compelled recognition of the woman citizen's equal stature and dignity in only one particular -- the grant of the franchise by the nineteenth amendment. Fay v. New York, 332 U.S. 261, 290 (1947).

In keeping with the habit of thought that has so long operated to restrict women's options and confine their opportunities, Missouri's Supreme Court described the explicit gender line here at issue as favoring the sex traditionally marked "fairer," "weaker," or "second." See 583 S.W.2d at 167-68. But cf. S. de Beauvoir, Second Sex (1949).30/ But in a series of decisions spanning the decade, this Court has removed the judicial blinders: it has recognized that old accepted rules and customs purportedly favoring women do so only in conjunction with a view of them as men's appendages. See, e.g., Califano v. Goldfarb, 430 U.S. 199, 222-24 (1977) (Stevens, J., concurring). The "favor" Missouri paternalistically accords woman as wife comes at an exorbitant price -- as wage earner woman is disfavored, shortchanged, not automatically ranked in common with her brother as "breadwinner," "supporter," "provider."

Under the invigorated review standard evolved by this Court,31/ overt sex

30/ For early identification of the defective vision that led "men of the legal profession" to regard sex-based discrimination as "protection" or "favor" for women, see Matthews, Women Should Have Equal Rights with Men: A Reply, 12 A.B.A.J. 117, 120 (1926); Crozier, Constitutionality of Discrimination Based on Sex, 15 B. U. L. Rev. 723 (1935). More recent commentary includes Ginsburg, Gender and the Constitution, 44 U. Cin. L. Rev. 1 (1975).

31/ See Karst, Equal Citizenship under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 54 (1977); The Supreme Court, 1976 Term, 91 Harv. L. Rev. 70, 177-88 (1977).

classifications have been invalidated in a variety of contexts, from estate administration (Reed v. Reed, 404 U.S. 71 (1971)) to social welfare measures. Califano v. Westcott, 99 S. Ct. 2655 (1979). Refusing to review these classifications through a rose-colored lens, the Court has at last seen what many women and men have struggled to reveal for generations.32/ Throughout the nation's history sex has been "the touchstone for pervasive and often subtle discrimination," hence official resort to an explicit gender criterion should be reviewed skeptically and scrupulously, it should not survive constitutional challenge absent "an exceedingly persuasive justification." See Personnel Administrator of Massachusetts v. Feeney, 99 S. Ct. 2282, 2293 (1979). "[T]he historic legal and political discrimination against women," the Court now appreciates, has been "severe" and readily maintained because sex, like race, is an "obvious badge." Mathews v. Lucas, 427 U.S. 495, 506 (1976).33/ Absent heightened judicial

32/ See generally W. Chafe, The American Woman (1972); E. Flexner, Century of Struggle (rev. ed. 1975); E. Janeway, Man's World, Woman's Place (1971); L. Kanowitz, Women and the Law (1969); A. Kraditor, ed., Up From the Pedestal (1968); J. S. Mill, Subjection of Women (1869).

33/ The marked tendency "in America to trace two clearly distinct lines of action for the two sexes" has been apparent even to observers from abroad. See A. de Tocqueville, Democracy in America, pt. 2 (Reeves tr. 1840), in World's Classic Series, Galaxy ed. at 400 (1947); cf. G. Myrdal, An American Dilemma 1073 (2d ed. 1962).

sensitivity to gender-based classifications, the risk is high, as the instant case reveals, that legislation distinguishing between men and women based on "habit, rather than analysis or actual reflection," will continue to clutter the law books of nation and state.34/ See Califano v. Goldfarb, 430 U.S. 199, 222 (1977) (Stevens, J., concurring).

While this Court has repeated the instruction that explicit sex classification must fall when freighted with the "baggage of sexual stereotypes," Orr v. Orr, 440 U.S. 268, 283 (1979), including gender-based "assumptions as to dependency," Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975),35/ lower courts36/ and defenders of discrimination view the Court's pronouncements as unclear. The case at bar is illustrative.

34/ See generally Report of the U.S. Comm'n on Civil Rights, Sex Bias in the U.S. Code (1977); B. Brown, A. Freedman, H. Katz & A. Price, Women's Rights and the Law (1977).

35/ Accord, Califano v. Goldfarb, 430 U.S. 199, 206-207 (1977).

36/ Cf. Arp v. Workers' Comp. Appeals Bd., 19 Cal.3d 395, 400, 563 P.2d 849, 851 (1977) (describing as "not entirely clear" this Court's post-1971 direction regarding gender-based classification). But cf. The Supreme Court, 1978 Term, 93 Harv. L. Rev. 60, 130, 133-35 (1979) (asserting that Orr and Westcott provide clearer guidance than did earlier decisions).

Judge Donnelly, concurring in the result below, maintained this Court's decisions signal a green light for any position one might take. Hence, he concluded, there is "no identifiable 'supreme Law of the Land' . . . by which [lower courts] may adjudicate a claim of alleged gender-based discrimination." 583 S.W.2d at 168. Accordingly, he continued, state law is dispositive and, in Missouri, "gender-based discriminations are held to be matters for legislative determination that cannot be considered by the court." Id. at 169. Appellees, Ruth Wengler's employer and its insurer, have urged the Court that utmost deference is due to the legislature's preference for lump categorization by gender over functional, sex-neutral classification. Motion to Dismiss at 9. The majority below regarded as relevant precedent Weinberger v. Salfi, 422 U.S. 749 (1975), in which the Court emphasized the wide leeway generally open to legislatures in framing social legislation. 583 S.W.2d at 166. Missouri's Supreme Court contrasted a "strict scrutiny" standard with one based on "substantial relationship," and apparently equated the latter with cursory review. Id. at 167.

But careful attention to this Court's decisions reveals the distinction that has eluded appellees and the court below. In the generality of cases, as Salfi holds, broad latitude for legislative line-drawing is the rule. The Court has confirmed this position in several recent adjudications. See Califano v. Boles, 99 S. Ct. 2767 (1979); Califano v. Jobst, 434 U.S. 47 (1977); Mathews v. DeCastro, 429 U.S. 181 (1976);

Mathews v. Lucas, 427 U.S. 495 (1976). One has only to compare this string of decisions with Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), Califano v. Goldfarb, 430 U.S. 199 (1977), and Califano v. Westcott, 99 S. Ct. 2655 (1979), to grasp the point. Sex-based classification is handy and habitual though it serves no interest functional classification could not more effectively and evenly serve. Traditionally, sex classification has operated to "put women not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion). "Past abusive discriminatory attitudes toward women," 583 S.W.2d at 167, will be projected far into the future unless official reliance on sexual stereotypes attracts the close review accorded other rankings that shore up and perpetuate society's longstanding prejudices -- classifications based on race, religion and national origin.

Commentators, reflecting particularly on last Term's decisions in Orr and Westcott, supra, have concluded that, while the Court has not yet officially stamped sex classifications "suspect," all is in place save the seal. See The Supreme Court, 1978 Term, 93 Harv. L. Rev. 60, 130, 135 & n. 35 (1979). But so long as the Court holds back clarion statement that the gender criterion is indeed "suspect," a procession of lower court dispositions, such as the one now before the Court, may be anticipated. Cf. Duren v. Missouri, 439 U.S. 357 (1979).

In sum, substantial confusion among lower courts persists as to the standard of review appropriate to gender-based classifications. Over seven years ago, when Frontiero v. Richardson was before the Court, the insidious side of virtually every gender classification, even those traditionally rationalized as "benign," was illuminated. See Brief of American Civil Liberties Union, Amicus Curiae and Joint Reply Brief of Appellants and American Civil Liberties Union, Frontiero, supra. The parade of cases since Frontiero challenging legislation rooted in "old notions" and "overbroad generalizations" about women and men[37] should leave no doubt on the point urged at the start of the 1970s: designation of sex as a suspect criterion is overdue, it provides the only wholly satisfactory standard for dealing with the claim in this case, and it should be the starting point for addressing

37/ See, e.g., Stanton v. Stanton, 421 U.S. 7 (1975) (sex-based age differential); Craig v. Boren, 429 U.S. 190 (1976) (sex-based age differential again); Taylor v. Louisiana, 419 U.S. 522 (1975) (automatic exemption of women from jury service); Duren v. Missouri, 439 U.S. 357 (1979) (automatic exemption of women from jury service again).

every remnant of the common law heritage that denied women independence and instead caused them to be "clouded and overshadowed" by men.[38]

38/ The Lawes Resolution of Women's Rights (London 1632), quoted in E. Flexner, Century of Struggle 7-8 (rev. ed. 1975); 1 W. Blackstone, Commentaries* 442; cf. Sayre, Property Rights of Husband and Wife, 7 Marr. & Family Living 17-18 (1944). 1976 Revised Statutes of Missouri Section 287.240(4)(a) plainly reflects the common law baggage once explained as disabling women only to protect and benefit them, thus rendering the female sex "so great a favourite . . . of the laws of England." 1 W. Blackstone Commentaries* 445.

CONCLUSION

The work-related benefit here at issue, tied as it is to the independent man/dependent woman model, inevitably stamps males as the wage earners who count first and in full, females as secondary workers who merit less than a full count. No effective amelioration of women's economic position is possible until that model is replaced by one neutrally based on the economic and social interdependence of wife and husband.

For the reasons stated above, the decision of the Missouri Supreme Court should be reversed, and 1976 Revised Statutes of Missouri Section 287.240 should be declared unconstitutional insofar as it differentiates between the surviving spouses of deceased workers solely on the basis of gender.

On remand, the court below may fully preserve the death benefit for a worker's widow by declaring the benefit equally

applicable to a worker's widower.[39/]

Respectfully submitted.

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39/ Death benefits entail a relatively insignificant cost. In 1974, for example, the last year in which Missouri separately stated the sex of employees killed on the job, females accounted for 9 of the 127 deaths; benefits paid out for all 127 deaths were $119,844.71, in contrast to pay outs for all injuries, including deaths, of $21,553,664.58. Missouri Division of Workmen's Compensation, 48th Annual Report at 17, 19, 25 (1975). In 1976, death payments were $274,781.06, total workers' compensation payments, $21,426,866.17 Missouri Dep't of Labor and Industrial Relations, Annual Report Fiscal Year 1977 at 21. For 1977, the figures are $263,211.19 for death benefits, $25,534,986.55 for all workers' compensation payments. Missouri Dep't of Labor and Industrial Relations, Annual Report Fiscal Year 1978 at 22. The national experience is similar. See Report of the National Commission on State Workmen's Compensation Laws 71 (1972) (work-related deaths account for less than 1% of all workers' compensation claims and less than 10% of all benefits).

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